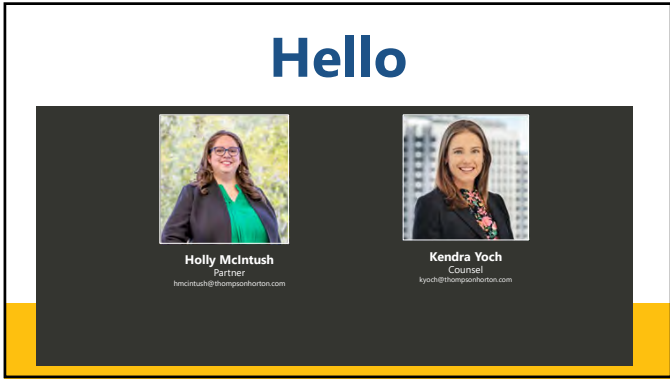
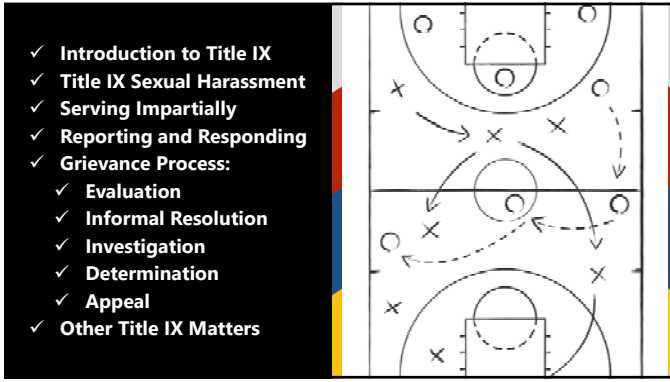




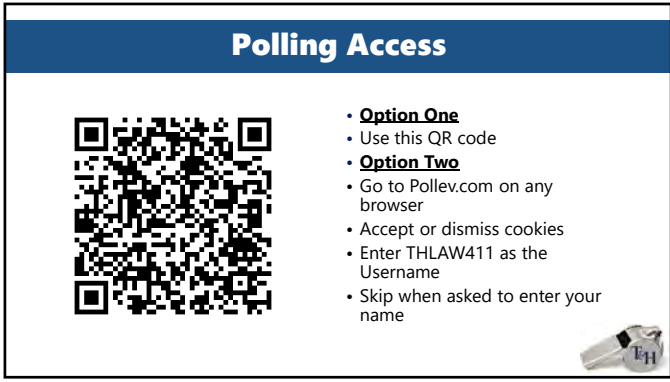
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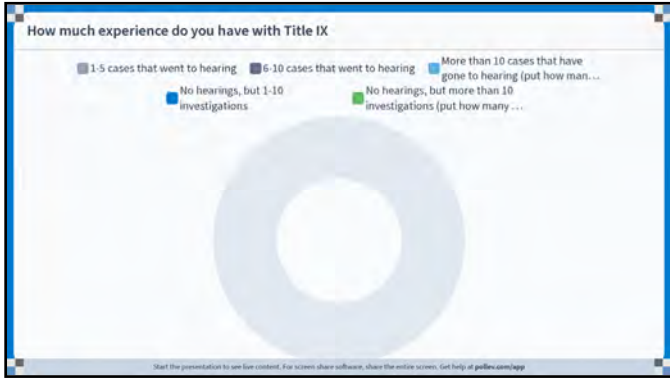
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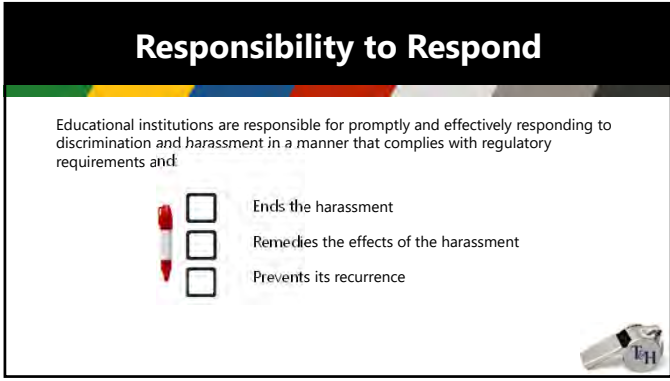
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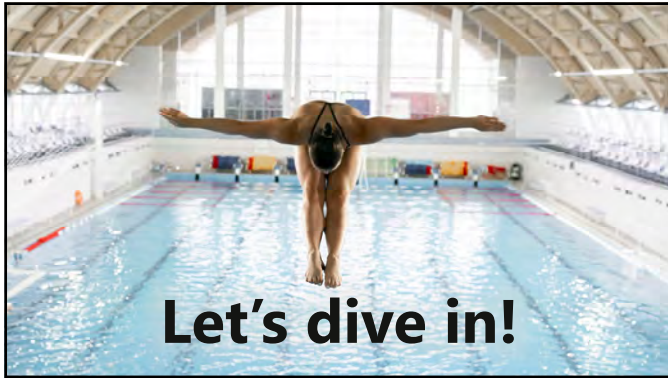
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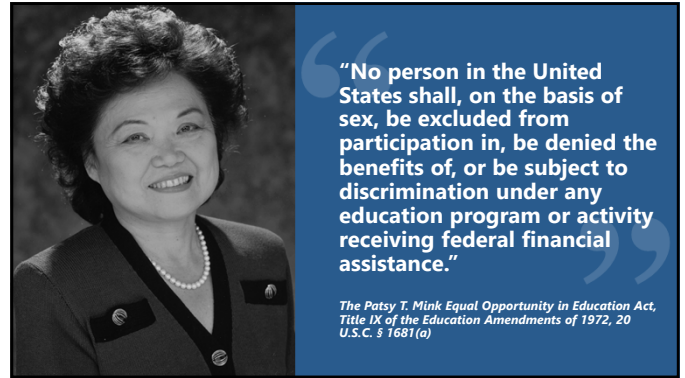
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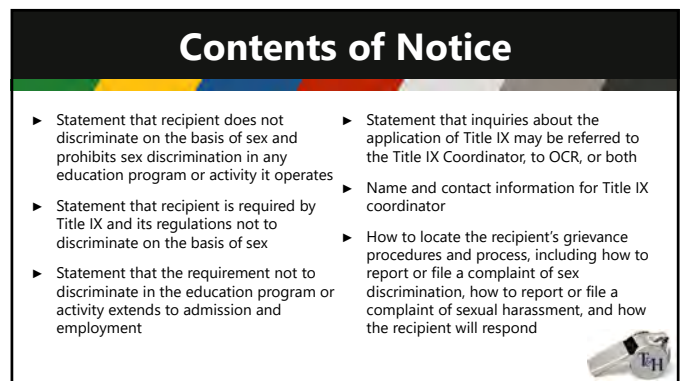
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11





12



13

## Publication of Notice

- ▶ Website
- ▶ Each handbook, catalog, announcement, bulleting, and application form to persons entitled to notice or which are used in connection with recruitment of students or employees

14

## Website Requirements



- ▶ The following information must be posted on the school's website:
  - ▶ Contact information for the Title IX Coordinator (name or title, office address, e-mail address, telephone number)
  - ▶ Title IX nondiscrimination policy and grievance procedures
  - ▶ Materials used to train Title IX Coordinators, investigators, decisionmakers, appeal decisionmakers, and informal resolution facilitators

<http://school.edu/TitleIX>



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## Title IX Enforcers


 <p><b>OCR</b></p> <ul style="list-style-type: none"> <li>• Regional offices across the U.S., including D.C.</li> <li>• Low bar for opening complaints</li> <li>• Remedies typically include policy changes, training, other remedial efforts</li> </ul>	 <p><b>Department of Justice</b></p> <ul style="list-style-type: none"> <li>• Based in D.C.</li> <li>• Typically handle higher profile cases</li> <li>• Investigatory and resolution processes are similar to OCR, but can file Federal lawsuits</li> </ul>	 <p><b>Federal Courts</b></p> <ul style="list-style-type: none"> <li>• Individuals who believe their rights have been violated can sue the school</li> <li>• Intense litigation process</li> <li>• Can lead to significant monetary damages</li> </ul>
--	---	--



16

## Administrative Enforcement


- ▶ The Office for Civil Rights (OCR) of the Department of Education (ED) is charged with enforcing Title IX. It investigates allegations of Title IX violations.
- ▶ The agency may not initiate enforcement proceedings unless it has given notice of the deficiency to the recipient and the recipient has refused to voluntarily comply. *Gebser*, 524 U.S. at 288.
- ▶ If the recipient refuses to comply, the agency can initiate proceedings to revoke federal funding.



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## Administrative Enforcement

- ▶ The "central purpose" of requiring notice is "to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its program and is willing to institute prompt corrective measures." *Gebser*, 524 U.S. at 289.
- ▶ OCR's mission is to ensure equal access to education and to promote educational excellence through vigorous enforcement of civil rights in our nation's schools.
- ▶ They are a neutral – not the enemy.




18

## Title IX Non-Compliance Penalties

**Most Common**

- ▶ OCR Remedial Action
  - ▶ Resolution agreement/monitoring
  - ▶ Can lead to process to remove federal funds (lengthy process)
  - ▶ Involves a hearing
  - ▶ Subject to judicial review




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## Title IX Non-Compliance Penalties

**Less Common**

- ▶ Impact on ED Grant Funds—even before option to enter resolution agreement
- ▶ A referral to the DOJ with a recommendation that it file suit
- ▶ Lawsuits filed by alleged victims or perpetrators in Federal court
  - ▶ Can lead to money damages (though limited by the U.S. Supreme Court in *Cummings*)
  - ▶ The standards are higher than OCR standards, so we train on the lower OCR standards and leave the higher standards to your litigators




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29

### Title IX Sexual Harassment

- ▶ Jurisdiction
  - ▶ In an education program or activity
  - ▶ Against a person in the United States
- ▶ Sexual harassment
  - ▶ Quid pro quo
  - ▶ Hostile environment
- ▶ Sexual Violence
  - ▶ Sexual assault
  - ▶ Domestic violence
  - ▶ Dating violence
  - ▶ Stalking




30



32

### Do We Use Title IX?

Is it Title IX sexual harassment?




33

### Do We Use Title IX?

Is it Title IX sexual harassment?

Did the harassment occur in a college/university education program or activity?



34

### Do We Use Title IX?

- Is it Title IX sexual harassment?
- Did the harassment occur in a college/university education program or activity?
- Was it in the United States?



35

### Do We Use Title IX?

- Is it Title IX sexual harassment?
- Did the harassment occur in a college/university education program or activity? → Title IX Grievance Process
- Was it in the United States?



36

### Do We Use Title IX?

- Is it Title IX sexual harassment?
- No** Did the harassment occur in a college/university education program or activity? 
- Was it in the United States?

If answer to any question is **NO**, the Title IX Grievance Process does not apply. Use process for other misconduct.



37

### Do We Use Title IX?

- Was it in the United States?



38



39

### Do We Use Title IX?

- Did the harassment occur in a college/university education program or activity?
- Was it in the United States?



40

### Did the conduct occur in an education program or activity?




- Classroom
- Hallway
- Restroom
- Dining Hall
- Lockers
- Parking Lot
- Clinics
- Gym
- Playing Field
- Transportation
- Technology\*



41

### Do We Use Title IX?

- Is it Title IX sexual harassment?
- Did the harassment occur in a college/university education program or activity?
- Was it in the United States?




42

## Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ The "Big Four"—Sexual Offenses
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking




43

## Title IX Sexual Harassment

**Unwelcome conduct** based on sex that is:


- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ The "Big Four"—Sexual Offenses
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking



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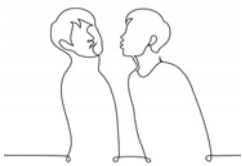
### Was the conduct "unwelcome"?

- ▶ Not solicited or invited, and the target considers it undesirable or offensive
- ▶ Acquiescence—even willing participation—or the failure to complain or report the conduct does not always mean the conduct was welcome
- ▶ Conduct welcomed on one occasion can be unwelcomed on a subsequent occasion
- ▶ Whether conduct is "welcome" can be impacted by age, disability, relationships, culture, and intoxication



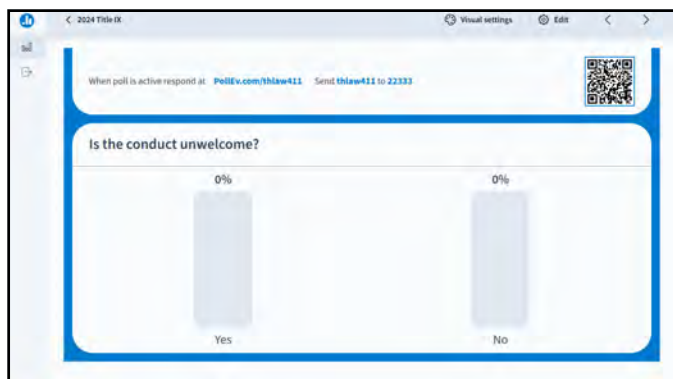
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### Welcome?



Student Cole reports that Ryan asked Cole for a kiss. Cole did not say no. Cole reports looking at Ryan uncertainly, however, and not kissing Ryan back. When asked for details, Cole said they were too afraid to say no because Ryan is the president of a student club Cole is in and Cole didn't want to be an outcast.

46




47

## Title IX Sexual Harassment

Unwelcome conduct **based on sex** that is:

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ The "Big Four"—Sexual Offenses
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking




48

### Was the conduct "sex-based"?

The preamble to the 2020 Rules explains that on the basis of sex includes:

- ▶ Conduct that is sexual in nature
- ▶ Conduct that references one sex or another
- ▶ Conduct aimed at a particular sex
- ▶ Sex stereotyping (gender norms)

Any individual, irrespective of sexual orientation or gender identity can be the victim of sexual harassment




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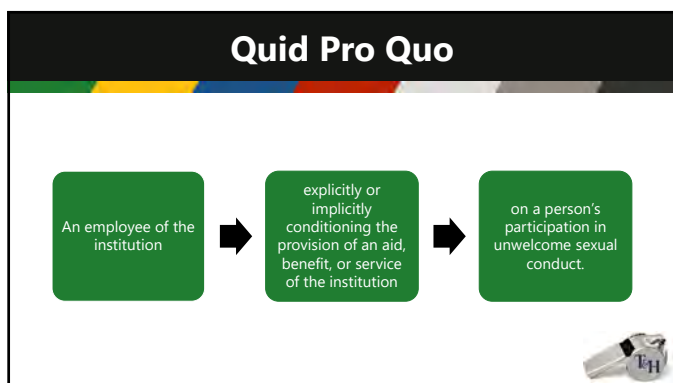
## Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

- ▶ **Quid Pro Quo Harassment**
- ▶ Hostile Environment Harassment
- ▶ The "Big Four"—Sexual Offenses
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking




50



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### Quid Pro Quo

- ▶ Students by definition cannot engage in quid pro quo sexual harassment
- ▶ It is **presumed** the sexual conduct is unwelcome, severe, objectively offensive, and deprived a student of educational access
- ▶ The employee does not have to make the condition explicit—i.e., state "this for that"—the condition may be implied from the circumstances
- ▶ The age and situation/position of the parties is relevant to the determination of whether a condition is implied




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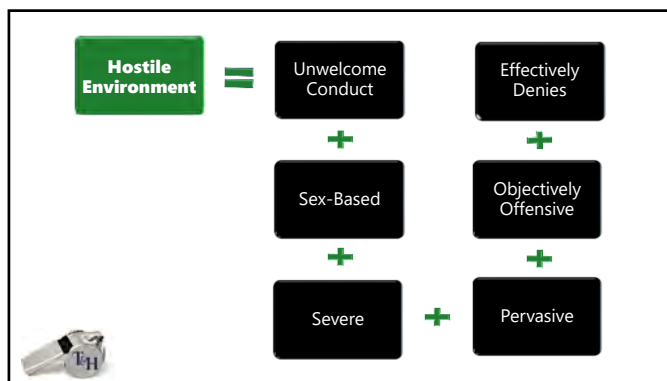
## Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

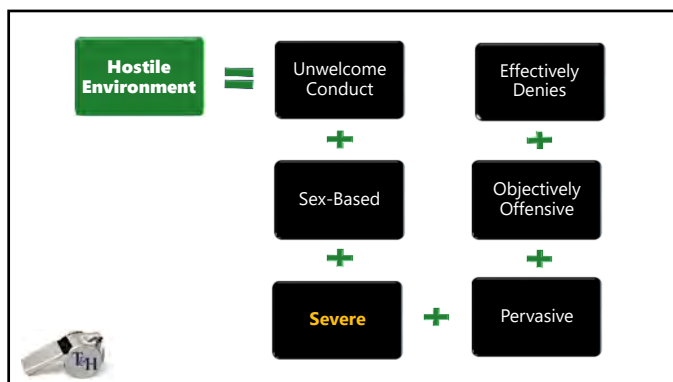
- ▶ Quid Pro Quo Harassment
- ▶ **Hostile Environment Harassment**
- ▶ The "Big Four"—Sexual Offenses
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking



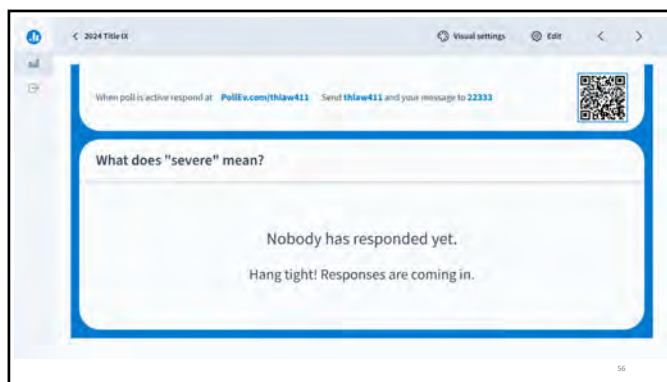
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56

### Severe


- ▶ Nature and degree of the harassment
- ▶ Severe: "causing very great pain, difficulty, worry, damage, etc.; very serious" (Cambridge Dictionary)
- ▶ Severe: "very bad, serious, or unpleasant"; "causing a lot of physical pain or suffering;" "very harsh" (Britannica Dictionary)



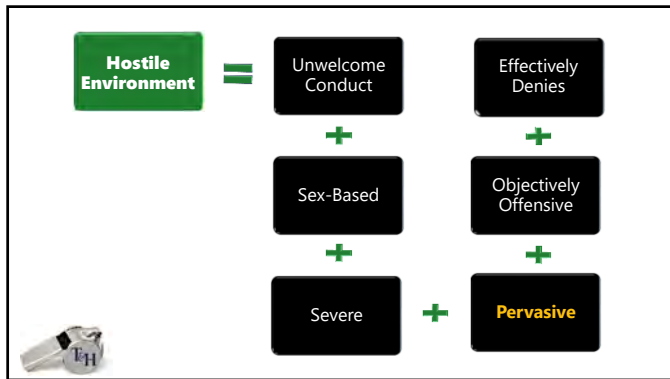
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## Severe ... The Courts Have Spoken

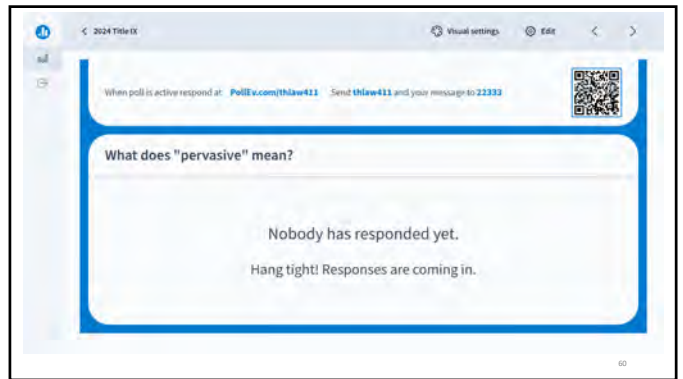
- ▶ Must be extreme, and not merely rude or unpleasant  
*Kollaritsch v. Michigan State Univ. Bd. of Trs.*, 944 F.3d 613 (6th Cir. 2019), cert. denied 141 S. Ct. (2020)
- ▶ Goes beyond mere juvenile behavior among students, even if the behavior is antagonistic, non-consensual, and crass  
*Jenkins v. Univ. of Minn.*, 131 F. Supp. 3d 860 (D. Minn. 2015), *aff'd*, 838 F.3d 938 (8th Cir. 2016)



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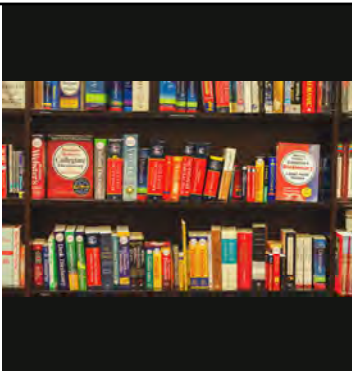
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60

### Pervasive

- ▶ Frequency or duration of harassment; scope or continuousness
- ▶ Systemic or widespread
- ▶ Pervasive: "existing in or spreading through every part of something" (Merriam-Webster Dictionary)
- ▶ Pervasive: "present or noticeable in every part of a thing or place" (Cambridge English Dictionary)




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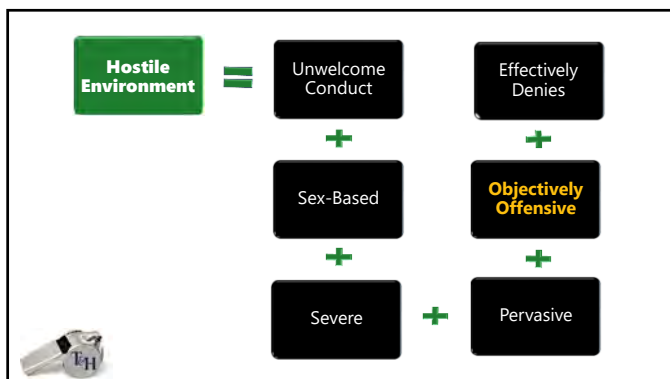
### Pervasive ... The Courts Have Spoken

- ▶ In *Davis v. Monroe County*, the Supreme Court limited student-on-student harassment to encompass only "pervasive" and "widespread" conduct with the "systemic effect of denying the equal access to an educational program or activity"
- ▶ Courts evaluate whether there was a "systemic or ongoing pattern of harassment," a "series of incidents," or "numerous acts of objectively offensive" conduct

*E.g., Carmichael v. Galbraith, 574 F.App'x 285 (5th Cir. 2014)*



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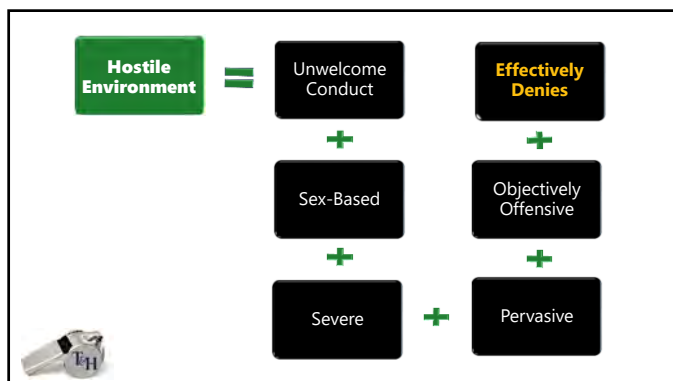


63

- ▶ Offensive to a reasonable person under the circumstances, not merely offensive to the victim, personally or subjectively
- ▶ The objective offensiveness of conduct is to be judged by reference to a reasonable student in similar circumstances at whom the conduct were aimed

## Objectively Offensive

64



65

## Effective Denies Equal Access to Your Education Programs or Activities

- ▶ Complainant must demonstrate some impact on their ability to participate or benefit from the education program or activity, but the definition does not specify any particular limits or denials
- ▶ Does not require a complainant to demonstrate any particular harm, such as reduced grades or missed classes
- ▶ Consider whether the complainant's participation is limited relative to a peer who has not experienced alleged sexual harassment

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- ▶ The degree to which the conduct affected the complainant's ability to access the education program or activity
- ▶ The type, frequency, and duration of the conduct
- ▶ The location of the conduct and the context in which the conduct occurred
- ▶ The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct
- ▶ Other sex-based harassment in the education program or activity

## Totality of Circumstances

67

## Title IX Sexual Harassment

Unwelcome conduct based on sex that is:

- ▶ Quid Pro Quo Harassment
- ▶ Hostile Environment Harassment
- ▶ **The "Big Four"—Sexual Offenses**
  - Sexual Assault
  - Domestic Violence
  - Dating Violence
  - Stalking

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## Specific Offenses

**#1 Sexual assault** means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation:

- **Rape** - penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person without the consent of the victim
- **Criminal Sexual Contact** - the intentional touching of the clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation; the forced touching by the victim of the actor's clothed or unclothed body parts, without consent of the victim, for the purpose of sexual degradation, sexual gratification, or sexual humiliation
- **Incest** - sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law
- **Statutory Rape** - sexual intercourse with a person who is under the statutory age of consent

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## Consent

- ▶ Title IX generally prohibits "unwelcome" conduct
- ▶ "Unwelcomeness" and lack of consent is generally presumed with respect to educator-on-student sexual harassment
- ▶ "Consent" comes into play in student-on-student sexual assault cases (rape, nonconsensual sexual contact)
- ▶ Not defined in Title IX Rules
- ▶ Must be defined in your policies/procedures

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### Consent... Generally

The existence of clearly understandable words or actions that manifest a knowing, active, voluntary, and present and ongoing agreement to engage in specific sexual or intimate conduct by one not suffering from incapacitation.

75

Consent is not present when a person does not have capacity to consent, voluntarily or involuntarily due to:

- ▶ Age
- ▶ Physical condition
  - Due to alcohol or drug consumption
  - Being unconscious
  - Being asleep, or in another state in which the person is unaware that the sexual activity is occurring
- ▶ Disability that impairs the individual's ability to give consent

### Capacity to Consent

76

**Key Question:** Should a reasonable person in the same circumstances have known the other party could or could not consent to the sexual activity?

### Incapacitation

77

### Specific Offenses

**#2 Domestic violence** includes felony or misdemeanor crimes committed by a person who is a current or former spouse, intimate partner, or person similarly situated to a spouse of the victim

78

### Specific Offenses

**#3 "Dating violence"** means violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship shall be determined based on a consideration of the following factors: the length of the relationship; the type of relationship; and the frequency of interaction between the persons involved in the relationship

Can include sexual, physical, emotional, or psychological violence or threat of sexual or physical abuse

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### Specific Offenses

**#4 "Stalking"** means engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress. It is covered by Title IX when on the basis of sex.

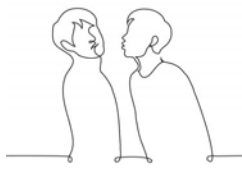
Examples:

- Following an individual around or spying on an individual
- Sending unwanted texts, email, or other communications
- Calling an individual often or leaving unwanted gifts
- Showing up to locations uninvited
- Threatening physical harm to an individual, their family, pets, or property

**Includes cyber-stalking**

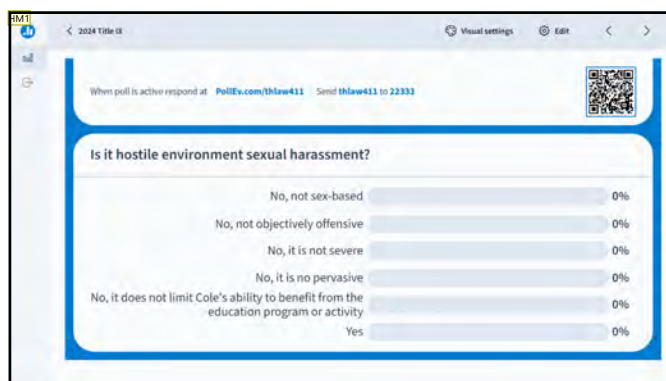
80

## Hostile Environment?



Let's return to Cole and Ryan. Recall: Student Cole reports that Ryan asked Cole for a kiss. Cole did not say no. Cole reports looking at Ryan uncertainly, however, and not kissing Ryan back. When asked for details, Cole said they were too afraid to say no because Ryan is the president of a student club Cole is in and Cole didn't want to be an outcast.

81



When poll is active respond at [PollEv.com/thlaw411](https://PollEv.com/thlaw411) Send [thlaw411](https://t.me/thlaw411) to 22333

Is it hostile environment sexual harassment?

No, not sex-based	0%
No, not objectively offensive	0%
No, it is not severe	0%
No, it is no pervasive	0%
No, it does not limit Cole's ability to benefit from the education program or activity	0%
Yes	0%

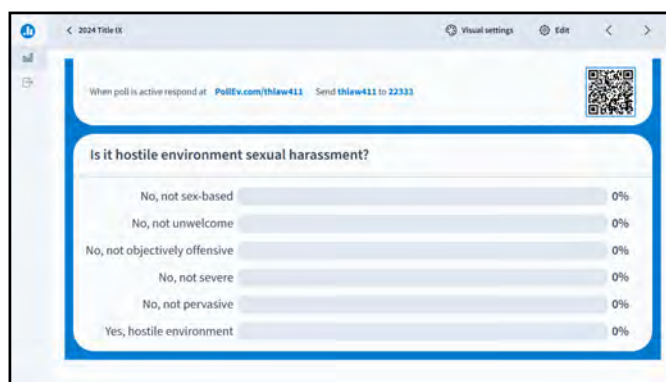
82

## Sexual Harassment?



Student reports that their theater instructor is too attentive to students, hugging them, massaging shoulders, and generally being "touch-y" and a "close talker."

83



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Is it hostile environment sexual harassment?

No, not sex-based	0%
No, not unwelcome	0%
No, not objectively offensive	0%
No, not severe	0%
No, not pervasive	0%
Yes, hostile environment	0%

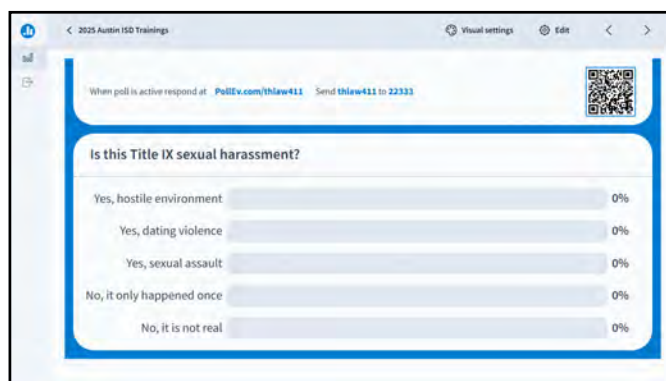
84

## Sexual Harassment?



Students report that Remi and Freddie used AI to create a sexually explicit video of two classmates and circulated it at their fraternity's party.

85



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Is this Title IX sexual harassment?

Yes, hostile environment	0%
Yes, dating violence	0%
Yes, sexual assault	0%
No, it only happened once	0%
No, it is not real	0%

86

## Sexual Harassment?

Callahan, a staff sponsor for the mock trial team at Harvard College, and a former partner at a Pearson Hardman, asks to see pre-law student Elle Woods alone in his office. First, Mr. Callahan praises Elle's debate skills, saying she will be a great lawyer for following her instincts, then asks if she has considered her career path. Elle says she has not but that she knows getting a summer job is competitive. Callahan explains that competition is really about "knowing exactly what you want and how far you will go to get it. How far will Elle go?" before putting his hand on her thigh. Elle throws off his hand and storms off.

87

When poll is active respond at: [PollEv.com/thlaw411](https://PollEv.com/thlaw411) Send thlaw411 to 22333

Is this Title IX sexual harassment?

Yes, hostile environment	0%
No, no sexual activity actually occurred	0%
No, it happened only once	0%
Yes, quid pro quo	0%
Yes, criminal sexual contact	0%

88

## Serving Impartially

How to serve without bias and avoid conflicts of interests

89

## Serving Impartially

- ▶ The Title IX regulations require that any individual involved in the Title IX process be trained and not be biased, have a conflict of interest, or prejudice any matter before them
- ▶ Includes
  - ▶ Title IX Coordinator
  - ▶ Investigator
  - ▶ Decisionmaker(s)
  - ▶ Appellate decisionmaker(s)
  - ▶ Informal resolution facilitator

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## Serving Impartially

- ▶ The rules do not define "bias," "conflict of interest," or "pre-judge."
- ▶ ED encourages recipients to use an objective, common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists.
- ▶ Ask whether a reasonable person would believe bias exists.

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## Bias


- ▶ "[A]n inclination of temperament or outlook, especially a personal and sometimes unreasonable judgment."
- ▶ "[T]o give a settled and often prejudiced outlook to"...a person's background biases them against others who are not like them
- ▶ Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice (Merriam-Webster)

92

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- ▶ Synonyms – nonobjectivity, one-sidedness, partiality, partisanship, prejudice (Merriam-Webster)

- ▶ Sex
- ▶ Race
- ▶ Ethnicity
- ▶ Sexual orientation
- ▶ Gender identity
- ▶ Disability
- ▶ Immigration status
- ▶ Financial ability
- ▶ Other characteristic



93

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- ▶ Sexual orientation
- ▶ Gender identity
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- ▶ Other characteristic

- ▶ Men are sexually aggressive and likely to sexually assault women
- ▶ Women often regret their sexual experiences and recast them as assault
- ▶ Men cannot be sexually assaulted
- ▶ The #metoo movement has led to many more false sexual assault reports by women

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## Conflict of Interest



A situation in which the concerns or aims of two different parties are incompatible.

“A conflict of interest arises when what is in a person’s best interest is not in the best interest of another person or organization to which that individual owes loyalty.”

<https://ethicsunwrapped.utexas.edu/glossary/conflict-of-interest>



95

## Conflict of Interest

<p><b>Clearest Conflicts:</b> Is related to the Respondent Formerly dated a key witness’s parent Invests in a business with the Complainant’s parent</p>	<p><b>Could be Conflicts:</b> Is Respondent’s Coach Has previously disciplined Complainant for dishonesty</p>
<p><b>Less Risk of Conflict:</b> Has a history of speaking out on victim or accused rights Has other responsibilities, e.g. 504 Coordinator, that cover parties</p>	<p><b>Not a Conflict:</b> Is an employee or attorney Has been trained on trauma informed practices</p>

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## Prejudgment


“To judge before hearing or before full and sufficient examination”

“[A]n opinion about a situation or a person that is formed before knowing or considering all of the facts.”

Cambridge Dictionary

**Synonyms** – preconception, assumption, presumption/presupposition, speculation

Merriam-Webster



97

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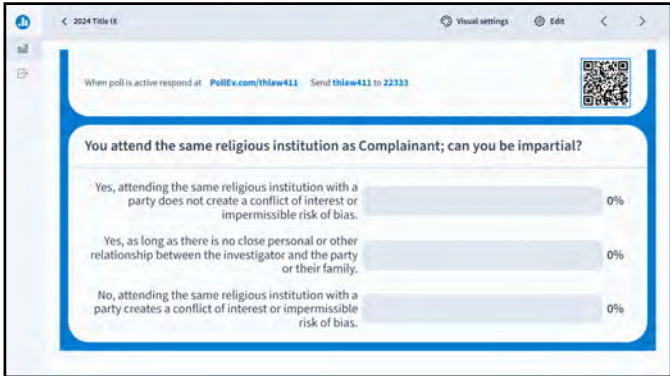
- ▶ A person was described as clearly upset during their interview, so you presume their recollection is credible
- ▶ A person was drinking at the time of the incident, so you presume they don’t remember what happened
- ▶ A person consented to sexual behavior before, so you presume they consented this time, too



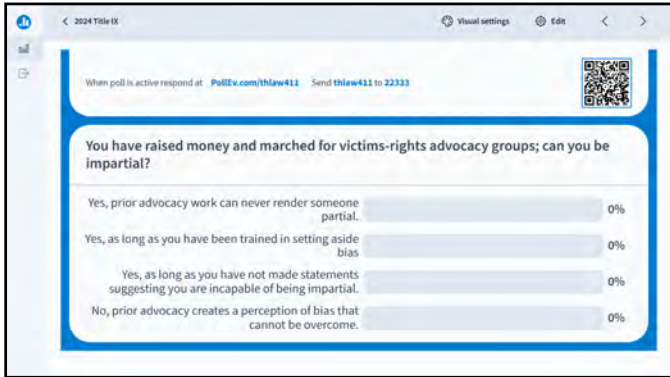
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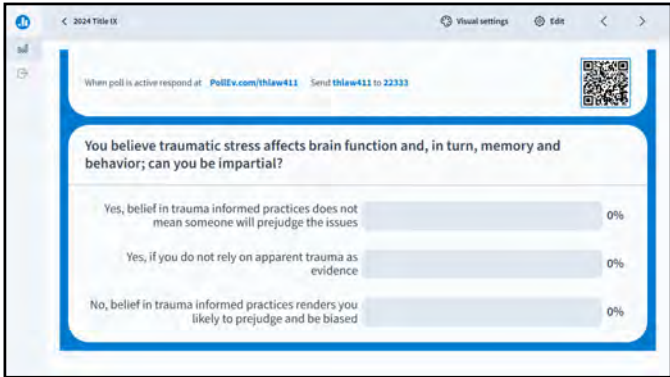
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### Impartiality DOs & DON'Ts

- ▶ DO be open with the Title IX Coordinator about any concerns
- ▶ DO follow the process "to the T" and include all relevant evidence in the investigative report, written decision, and appeal decision
- ▶ DON'T not assume or infer the existence of facts or the outcome, "connect the dots," speculate, rely on personal experience or beliefs, weigh credibility (unless you are the decision-maker on the initial complaint)

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### Time Out

106



### Reporting and Responding to Reports

107




### Report and Response

- ▶ Reporting requirements
- ▶ Intake
- ▶ Supportive measures
- ▶ Emergency removal
- ▶ Signing a complaint



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### Reporting Requirements




All "officials with authority" must **notify the Title IX Coordinator** when the official has information about conduct or allegations that **reasonably may constitute sexual harassment** under Title IX.

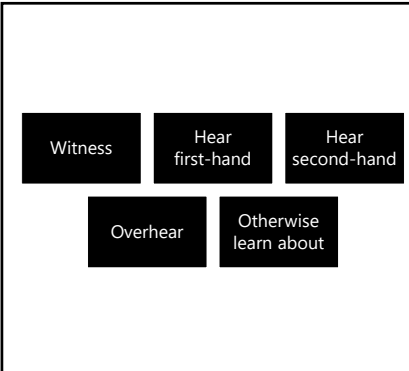
All other employees should also notify the Title IX Coordinator (and are often required to under institutional policy or state law)

Employees can notify the Title IX Coordinator of potential sex-based harassment or discrimination in any manner including:

- ▶ Orally (in-person/phone)
- ▶ In writing (email or other documentation)
- ▶ Any way that ensures the Title IX Coordinator receives the information.



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### Sources of information

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## Reporting Requirements

Employees may have multiple reporting obligations.

- ▶ **Title IX Coordinator** – conduct that may be sexual harassment (including sexual assault, stalking, and other potentially criminal behavior)
- ▶ **Law Enforcement** – conduct that may be criminal
- ▶ **Child Protective Services** – conduct that may constitute abuse or neglect



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**T&H Title IX Tip**

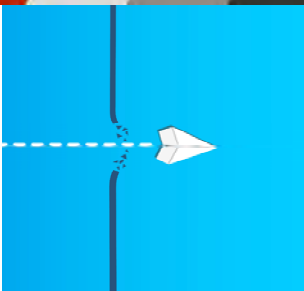
- ▶ Consider an online portal and/or phone hotline where students and employees can make Title IX reports
- ▶ If you already have a general portal or hotline for reports, create a way to designate a report as one of sexual harassment and a process where your Title IX Coordinator receives the report
- ▶ Use an email address, titleix@[your domain], where your Title IX Coordinator and designees can monitor and respond to reports

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## Monitoring Barriers to Reporting

Title IX coordinator should:


- ▶ Monitor your education program or activity for barriers to reporting information about conduct that may constitute sex discrimination or harassment under Title IX
- ▶ Take steps reasonably calculated to address such barriers



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## Identifying Barriers

- ▶ Your institution may hear after-the-fact about allegations of sexual harassment in your education programs and activities and realize these matters were never properly reported to your Title IX Coordinator.
- ▶ Perhaps the incidents were handled at a departmental or program/activity level with no notice to the Coordinator, or even handled by law enforcement.
- ▶ Because these issues must be reported to the Title IX Coordinator, your Title IX Coordinator should determine the root causes for why reporting is not occurring and take necessary action to correct it.



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## Students Underreport

Reasons students do not report	How you can help
<ul style="list-style-type: none"> <li>• Fear of retaliation, embarrassment, or humiliation</li> <li>• Fear of punishment or loss of special privileges</li> <li>• Confusion and worry that no one will believe them</li> <li>• Unable to process the assault as a sexual assault</li> <li>• Affections are manipulated, or they feel threatened</li> <li>• Lack knowledge about how to report</li> </ul>	<ul style="list-style-type: none"> <li>• Communicate to students that they have a right to be free from harassment and a responsibility not to harass</li> <li>• Let students know where they can go for help if they witness or experience harassment</li> <li>• Make reporting easy</li> <li>• Allow anonymous reporting through your online portal</li> <li>• Offer confidential resources</li> </ul>

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## Title IX Coordinator Initial Response

Notify	Support	Initiate
<ul style="list-style-type: none"> <li>▶ Complainant (or reporter) of grievance and informal resolution procedures</li> <li>▶ After complaint made, Respondent of grievance and informal resolution procedures</li> </ul>	<ul style="list-style-type: none"> <li>▶ Offer &amp; coordinate supportive measures for Complainant once report is made</li> <li>▶ Offer &amp; coordinate supportive measures for Respondent once complaint is made</li> </ul>	<ul style="list-style-type: none"> <li>▶ Emergency removal or administrative leave</li> <li>▶ Grievance process or informal resolution</li> <li>▶ Other steps to ensure harassment does not continue/recur</li> </ul>

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## Intake

- ▶ Initial meeting to better understand the allegations and whether they fall within the definition of Title IX sexual harassment
- ▶ Not an investigation or search of evidence
- ▶ Basic questions:
  - ▶ What happened?
  - ▶ Who was involved?
  - ▶ When and where did it happen?
- ▶ Also discuss the grievance process and offer supportive measures



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## Supportive Measures

- ▶ Must not **unreasonably** burden either party
- ▶ Must be designed to:
  - ▶ Restore or preserve access to the education program or activity
  - ▶ Protect safety of parties or educational environment
  - ▶ Provide support during grievance process
- ▶ Nondisciplinary and nonpunitive




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## Supportive Measures

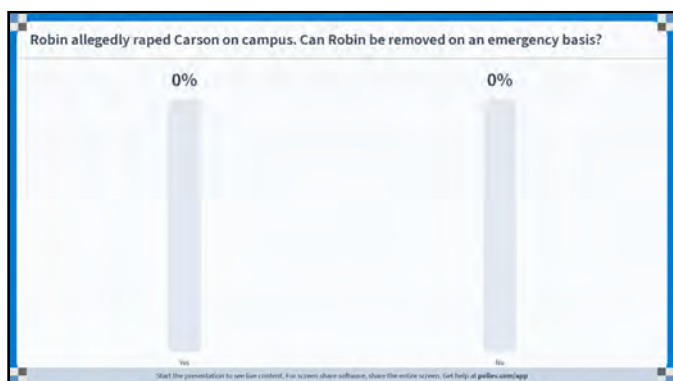
Academic	Emotional/Wellness	Safety/Security
<ul style="list-style-type: none"> <li>▶ Deadline extensions</li> <li>▶ Schedule modification or other course-related adjustments</li> <li>▶ Tutoring</li> <li>▶ Offers to retake courses or redo assignments</li> <li>▶ Changes in extracurricular activities</li> </ul>	<ul style="list-style-type: none"> <li>▶ Counseling</li> <li>▶ Excused absences</li> <li>▶ Leave of absence</li> <li>▶ Referral to medical or psychological care</li> <li>▶ Designation of a "safe adult" for check-ins</li> <li>▶ Training and education programs related to sexual harassment</li> </ul>	<ul style="list-style-type: none"> <li>▶ Mutual no contact orders</li> <li>▶ Escort between classes</li> <li>▶ Changes to class seating</li> <li>▶ Assignments to certain routes, bathrooms, or cafeteria locations</li> <li>▶ Increased security and monitoring</li> <li>▶ Assistance reporting potentially criminal conduct to law enforcement</li> </ul>

119

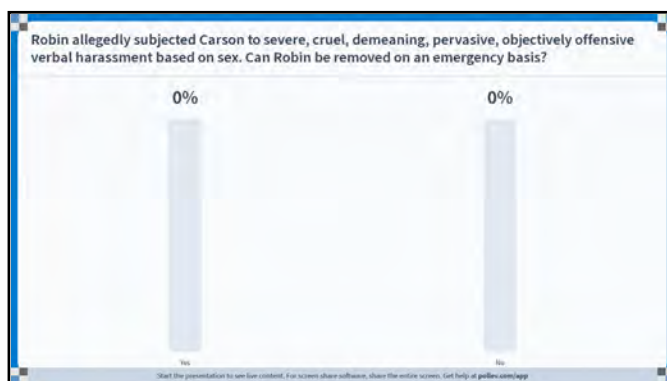
## Emergency Removal

- ▶ Must be on emergency basis
- ▶ Must conduct an individualized safety and risk analysis
- ▶ Must determine that an **immediate threat to the physical health or safety** of a complainant or any students, employees, or other persons arising from the allegations of sexual harassment justifies removal
- ▶ Does not modify any rights under IDEA, Section 504, or ADA

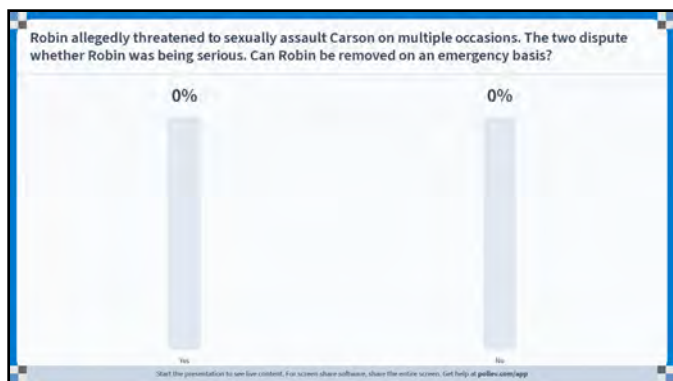
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### Administrative Leave

- ▶ Administrative leave with pay for employees is permitted
  - Follow state law, board policy, procedures, employment contracts, and collective bargaining agreements
- ▶ Decisions and processes for placing employees on administrative leave with pay should be consistent with your standard procedures regarding employee administrative leave during other investigations



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### When to Sign a Formal Complaint

Consider the following factors:

- ▶ Complainant's request not to initiate a complaint
- ▶ Complainant's reasonable safety concerns
- ▶ Risk that additional acts of harassment would occur if a complaint is not initiated
- ▶ Severity of the alleged sexual harassment, including whether (if harassment were established) the removal of a respondent or imposition of other disciplinary sanction would be required to end the harassment and prevent its recurrence
- ▶ Age and relationship of the parties, including whether the respondent is an employee
- ▶ Whether there is an alleged pattern, ongoing sexual harassment, or harassment affecting multiple individuals
- ▶ Availability of evidence to assist the decisionmaker
- ▶ Whether the institution could end the alleged sexual harassment and prevent its recurrence without initiating the grievance procedures



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### Sign a Formal Complaint?

Tommy, a student, reports that another student, Charlie, was sexually harassed by Professor Rowan. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

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When poll is active, respond at [poll.ev.com/thlaw411](https://poll.ev.com/thlaw411)  
Text: **TMLAW411** to 22333 once to join

### Should the Title IX Coordinator sign a formal complaint?

- No, it will be easier to address the conduct through a non-Title IX procedure, so it should be done that way
- No, the Title IX coordinator should respect the autonomy of the complainants and not override their decision
- Yes, the conduct alleged involves an employee using a position of authority to engage in sexual misconduct
- Yes, any time there is a pattern of behavior by the same alleged perpetrator the T9C should sign a formal complaint

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## Sign a Formal Complaint?

Dual credit student Cecil reports that their instructor made sexually suggestive comments to Cecil, asked Cecil repeatedly if they wanted rides home and for Cecil to babysit, and gave Cecil hugs frequently. Cecil asks to move to another section of the class but does not want to file a formal complaint.

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### Would you sign a Title IX complaint?


No, we would use our non-Title IX, HR processes to address the alleged conduct	0%
No, because Cecil's concern can be adequately addressed through a supportive measure of moving sections	0%
No, because the conduct alleged is not serious misconduct by a teacher such as sexual assault or violence	0%
Yes, because of the risk to students other than Cecil of sexual harassment by the teacher	0%
It depends on whether Cecil takes the class on our campus or their HS campus	0%

Start the presentation to see live content. Use screen share software. Share the entire screen. Get help at [galileo.com/help](https://galileo.com/help)

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## When to Sign a Formal Complaint

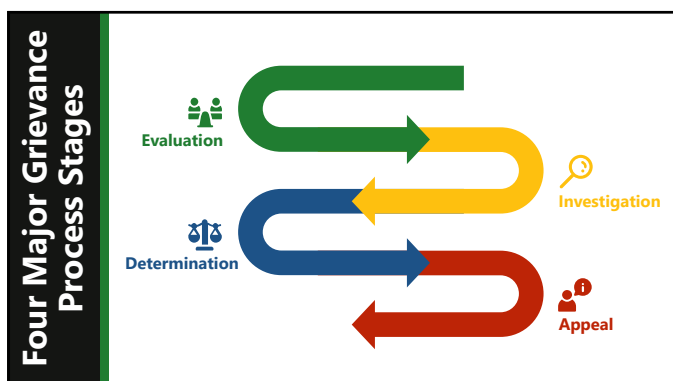
- ▶ Ultimate question is whether the alleged conduct either:
  - ▶ Presents an imminent and serious threat of harm to complainant or another person
  - ▶ Prevents the institution from ensuring equal access to its education programs or activities



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- ### Ten Basic Requirements for Grievance Process
1. Treat complainants and respondents equitably
  2. Require an objective evaluation of all relevant evidence
  3. Title IX personnel cannot have a conflict of interest or bias and must be trained
  4. Presumption that respondent is not responsible
  5. Reasonably prompt timeframes for conclusion of the grievance process
  6. Describe or list the range of possible disciplinary sanctions and remedies
  7. State whether the standard of evidence is the preponderance of the evidence or clear and convincing evidence standard
  8. Permissible bases for appeal
  9. Describe the range of supportive measures available
  10. Not seek, allow, or otherwise use evidence protected under a legally recognized privilege unless waived


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**Key Terms**

## Formal Complaint

**Any** document :

- ▶ Filed by a complainant or signed by the Title IX Coordinator
- ▶ Alleging sexual harassment against a respondent
- ▶ Requesting that the school investigate the allegation of sexual harassment




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**Key Terms**

## Complainant

A student or employee who is alleged to have been subjected to conduct that could constitute Title IX sexual harassment

- ▶ Even if report made by parent/guardian or third party
- ▶ Even if Title IX Coordinator initiates the grievance process




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**Key Terms**

## Respondent

An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment




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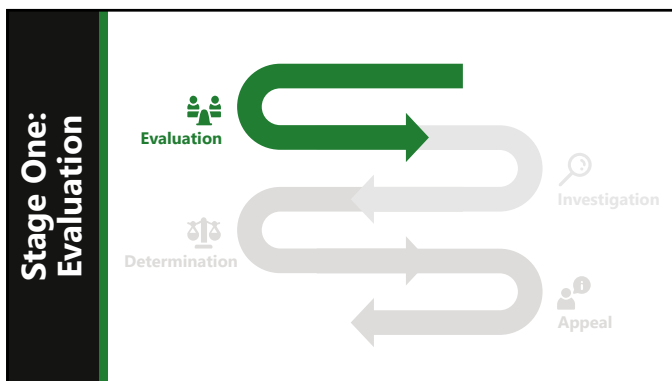


## Evaluation

- ▶ Notice of allegations
- ▶ Consolidation
- ▶ Dismissal



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**Only move to next steps if you have a Formal Complaint**

**– NO DISCIPLINE WITHOUT A FORMAL COMPLAINT & COMPLETING THE GRIEVANCE PROCESS –**


**But support, support, support**



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## Notice of Allegations

- ▶ The school's grievance process;
- ▶ The allegations of sexual harassment, including sufficient details **available at the time** to allow the parties to respond
  - Identity of parties involved
  - Conduct alleged to constitute sexual harassment
  - Date and location of alleged incident
- ▶ A presumption of non-responsibility;
- ▶ The right to inspect and review evidence;
- ▶ The right to have an advisor during the process;
- ▶ Any provision in the school's code of conduct that prohibits knowingly making false statements or submitting false information during the grievance process; and
- ▶ Statement that retaliation is prohibited



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## Consider Consolidation

Multiple Complaints

Same Circumstances

- Against more than one respondent
- By more than one complainant against one or more respondents
- By one party against the other party

- Where the allegations of sexual harassment arise out of the same facts or circumstances
- Consider defining the phrase in your procedures

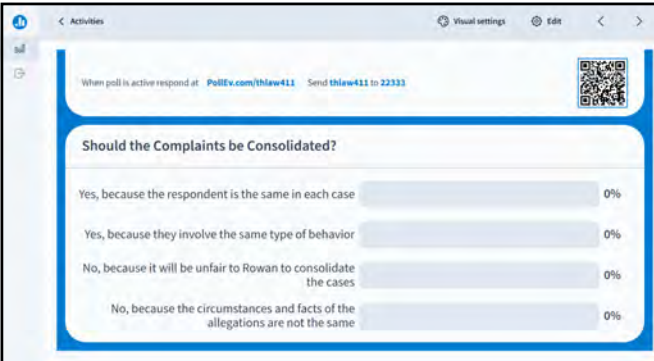
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## Consolidate?

Tommy, a student, reports that another student, Charlie, was sexually harassed by Professor Rowan. Tommy also says another student, Casey, was in a similar situation the previous year. Charlie and Casey confirm that the conduct occurred, but do not want to file a formal complaint.

The Title IX Coordinator signs formal complaints. Charlie and Casey agree to participate in the process. Neither knows the other exists, however.

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## Consider Dismissal

Mandatory

Permissive

- The conduct, if true, would not meet the definition of sexual harassment under Title IX
- The conduct did not occur in the institution's education program or activity
- The conduct did not occur against a person in the U.S.

- The complainant withdraws the complaint or allegations in writing
- The respondent is no longer enrolled or employed by the institution
- Specific circumstances prevent the institution from gathering sufficient evidence

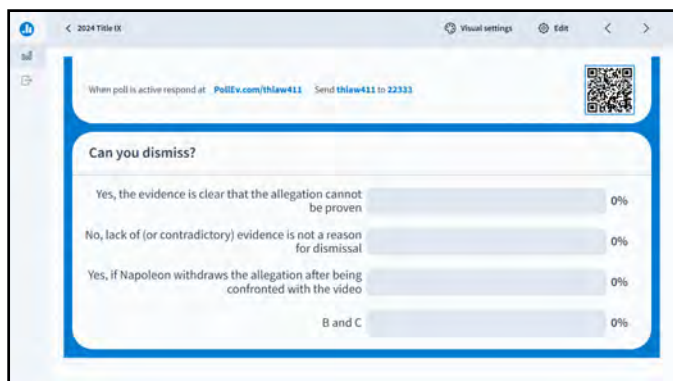
145

## Dismiss?

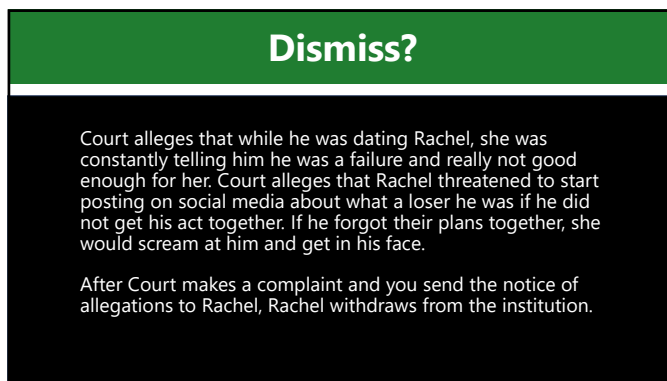
You receive a complaint alleging that student Napoleon Dynamite was subject to sex-based harassment by Summery Wheatley in chemistry lab.

You immediately pull the lab's security footage, but it shows no interaction between parties.

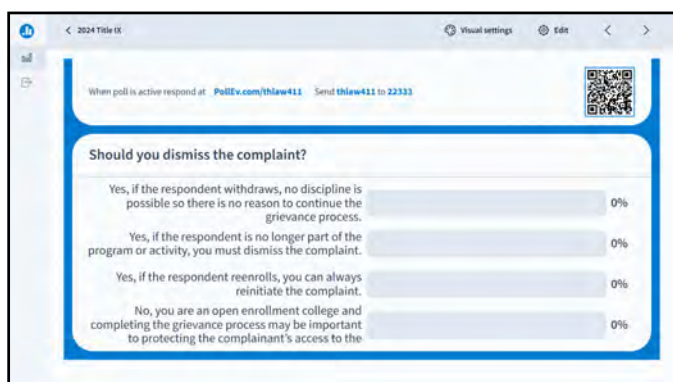
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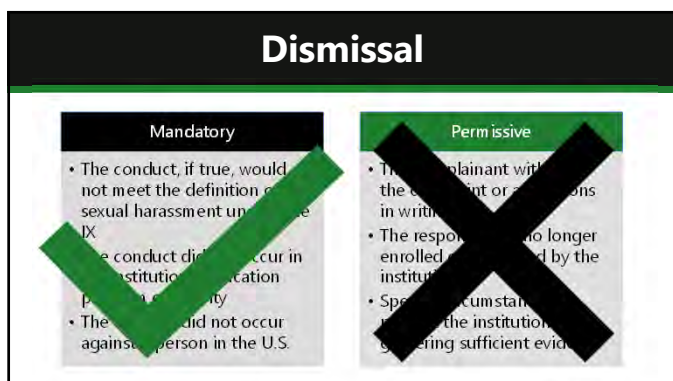
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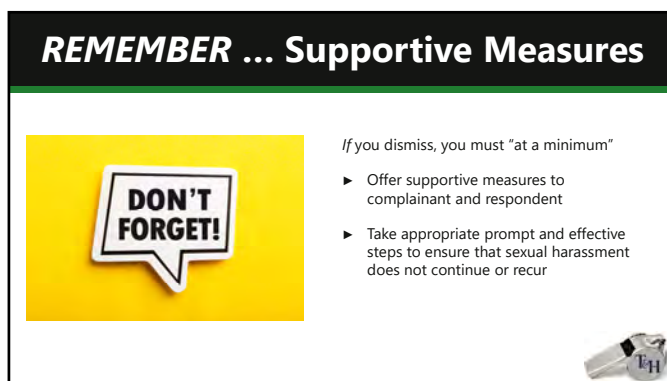
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### Appeal of Dismissal

- ▶ Any party can appeal dismissal
- ▶ Notify parties when appeal is filed
- ▶ Implement appeal procedures equally for the parties
- ▶ Appeal decisionmaker cannot be someone involved in the investigation or dismissal of complaint
- ▶ Appeal decisionmaker must be trained
- ▶ Parties must have reasonable and equal opportunity to make a statement in support of or challenging the dismissal
- ▶ Notify all parties of result of appeal and rationale for the outcome




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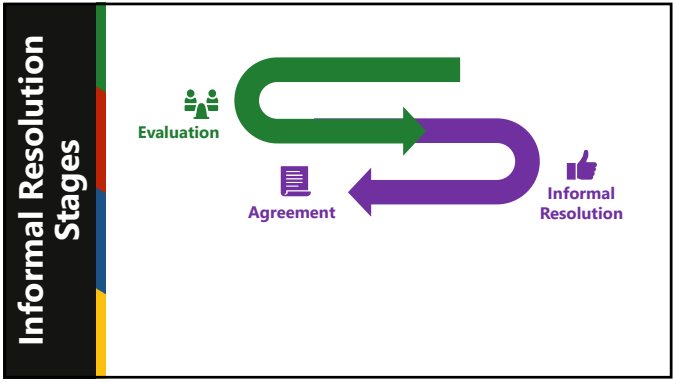
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### What is Informal Resolution?

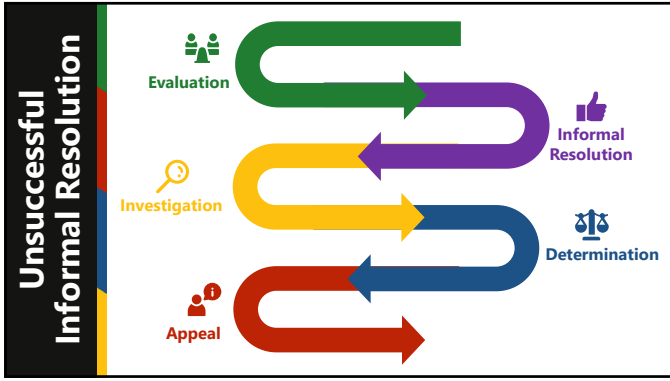
**A voluntary, structured interaction between involved parties (complainant and respondent) to resolve the allegations without an investigation, written determination, or appeal.**



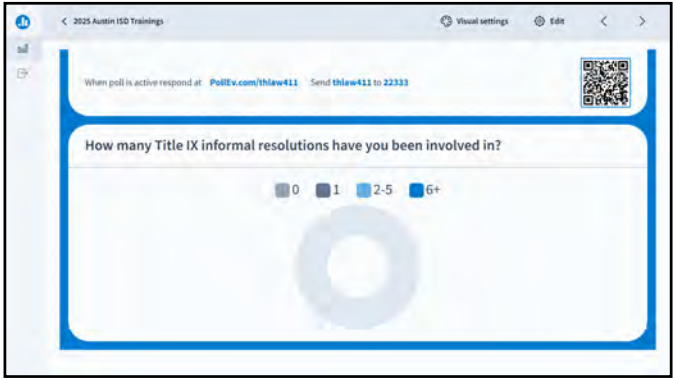
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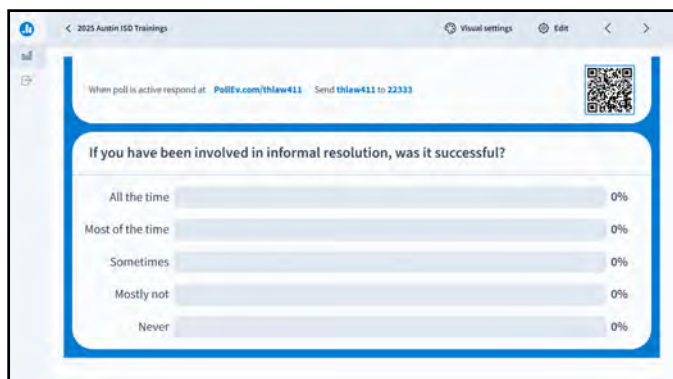
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## Goals of Informal Resolution


- ▶ Give parties agency and choice over the outcome of the conflict
- ▶ Restore and maintain access to education programs & activities
- ▶ Address the harm raised in the complaint and prevent future harm
- ▶ Facilitate communication and understanding between the parties (when desired)



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## Pros of Informal Resolution

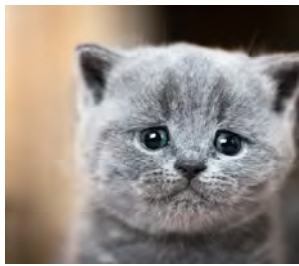
- ▶ Student preference to avoid investigation and hearing process
- ▶ Avoids re-traumatization through more adversarial investigation/decision-making procedures
- ▶ Potential holistic approach through restorative justice
- ▶ Voluntary – student buy-in
- ▶ Reduction of administrative burden
  - ▶ Fewer staff involved
  - ▶ Reduction in timeframes
- ▶ Potentially lowers risk of litigation



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## Cons of Informal Resolution

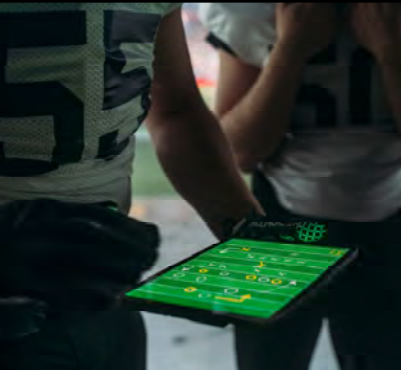
- ▶ Not appropriate in all cases
  - ▶ Cannot be used in cases with an employee respondent and student complainant
  - ▶ Cannot be used to avoid mandatory sanctions
- ▶ Perception that IR does not provide "justice"
- ▶ Parties might be hesitant to communicate with each other
- ▶ Unskilled facilitator can frustrate process



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### Informal Resolution Procedures

- ▶ When will the Title IX Coordinator offer informal resolution?
- ▶ What steps will the process follow?
- ▶ What records will be maintained and when can they be disclosed?
- ▶ Potential terms
- ▶ Institution's role
- ▶ Prompt timeframe



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## When to use IR

<p><b>Informal Resolution will not be offered (required)</b></p> <ul style="list-style-type: none"> <li>▶ Complaints involving a student complainant and an employee respondent</li> </ul>	<p><b>Informal Resolution will not be offered (consider)</b></p> <ul style="list-style-type: none"> <li>▶ When discipline is necessary to end the alleged conduct and prevent its recurrence                             <ul style="list-style-type: none"> <li>▶ Consider severity of the alleged conduct, pattern of behavior, future risk of harm to others</li> </ul> </li> <li>▶ When there is a power differential between the parties or risk of coercion</li> <li>▶ When multiple individuals may have been impacted but not all are participating</li> </ul>	<p><b>Informal Resolution will be offered</b></p> <ul style="list-style-type: none"> <li>▶ In all other cases (after a formal complaint is filed)</li> </ul>
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## Informal Resolution Process

- ▶ The institution can set up a process (in addition to the required notices) to guide informal resolution or allow the facilitator to develop a process based on the needs of the case
- ▶ Consider whether the parties will meet face-to-face, whether to allow advisors
- ▶ Potential steps:
  1. Introductory letter from facilitator to both parties
  2. Confirm consent to participate
  3. Request for statements from each party addressing the alleged conduct and desired outcome (optional)
  4. Meet/confer with parties (individually or together)
  5. The facilitator drafts the agreement
  6. Review by Title IX Coordinator and sign off on any action required by the school
  7. Parties (and parents of minors) sign
  8. If no agreement, return to grievance process

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## What to do with records?

- ▶ The written procedure and notice to the parties must state what information the school will maintain and whether and how it could be disclosed
- ▶ Any final agreement must be maintained (7 years), FERPA applies
- ▶ Consider not maintaining party statements, facilitator notes, offers and counter-offers
- ▶ **Recommended:** Prohibit the disclosure or use of information shared during the informal resolution in the investigation and decisionmaking process if informal resolution is not successful



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## Potential Terms

- ▶ The agreement may include any terms the parties agree on, and the institution is willing to enforce, as long as they do not violate other federal or state laws
- ▶ Consider both remedies and sanctions
- ▶ Consider:
 

<ul style="list-style-type: none"> <li>▶ No-contact order or stay-away agreement</li> <li>▶ Restrictions on participation in programs and activities</li> <li>▶ Community service</li> <li>▶ Admission of responsibility or apology</li> <li>▶ Verbal or written warning</li> </ul>	<ul style="list-style-type: none"> <li>▶ Impact statement by complainant</li> <li>▶ Training, educational courses, counseling, or coaching/mentoring</li> <li>▶ Campus escort</li> <li>▶ Change in class schedule or dining arrangements</li> <li>▶ Disciplinary sanctions</li> </ul>
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## Institution Agreement?

- ▶ The Rules do not require the Title IX Coordinator to approve or sign the agreement
- ▶ Practically, some terms will require implementation by the institution, such as:
  - ▶ Schedule changes
  - ▶ Housing changes
  - ▶ Written warnings and discipline
  - ▶ Provision of counseling, mentoring, training
- ▶ And the institution will monitor to ensure compliance with the agreement
- ▶ Consider including approval by the Title IX Coordinator in the IR process

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## Prompt Timeframe

- ▶ The procedure should include a timeframe to complete informal resolution or revert to the grievance process
- ▶ Notify both parties of any extensions and the reasons; keep parties updated
- ▶ Will the investigation be paused or continue while parties engage in IR?



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## Informal Resolution Steps

**Title IX Coordinator**

1. Evaluate
2. Provide Notice
3. Obtain Consent
4. Assign IR Facilitator

**IR Facilitator**


1. Review the file
2. Verify impartiality
3. Mediate
4. Resolve and agree



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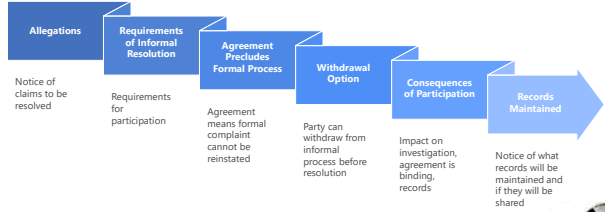
## Step 1: Evaluate

- ▶ Title IX Coordinator must determine if informal resolution is appropriate by conducting an initial assessment
- ▶ Use the requirements and considerations in your informal grievance procedures; consistent practices are important




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## Step 2: Provide Notice



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## Step 3: Obtain Consent




- ▶ Use a standard form that includes the required notices
- ▶ Obtain signatures from parties (and parents if parties are minors)
- ▶ Make sure that parties understand information in the notice, take time to answer questions

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## Step 4: Assign the IR Facilitator


- ▶ Upon receipt of Consent from all parties, the Title IX Coordinator will assign an Informal Resolution Facilitator
- ▶ Follow any criteria and considerations in your procedures



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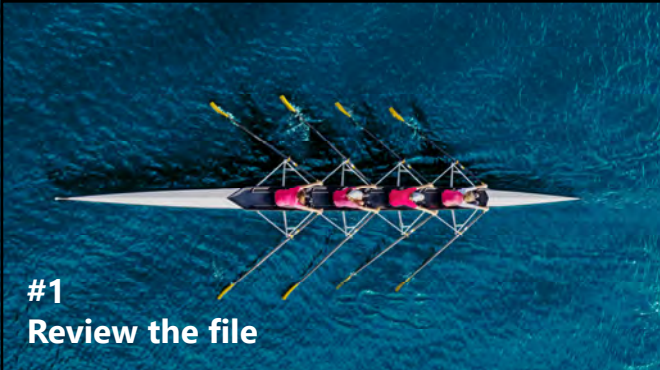
## IR Facilitator

- ▶ Generally the Title IX Coordinator chooses the facilitator
- ▶ Generally preferable not to be the investigator, decisionmaker, or appellate decisionmaker
- ▶ Must be **and look** impartial
- ▶ Should have the right "soft" skills
- ▶ Must be well-trained in informal resolution methods and the school's procedures



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## #1 Review the file



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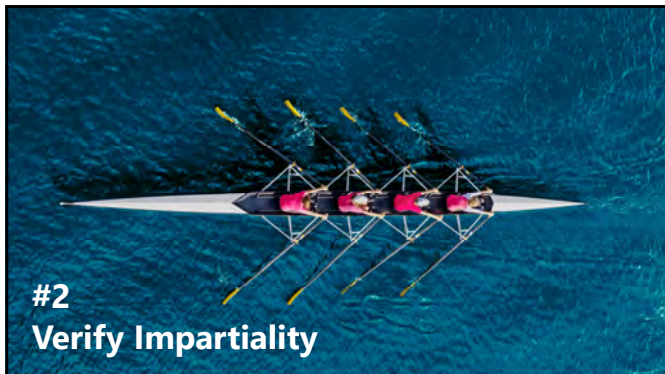
## Review the File



One you are assigned as the Informal Resolution Facilitator, you will need to carefully review the case file materials to:

- ▶ Carefully review the facts of the underlying case, the parties' respective positions regarding the dispute, including undisputed facts and facts which are still in dispute.
- ▶ Gauge how far apart the parties are in their positions and begin to think about how to bring those positions closer together.

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## #2 Verify Impartiality

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## Verify Impartially

- ▶ Determine whether you can serve impartially
- ▶ Identify any chance that you may even appear biased, conflicted, or otherwise not neutral if you proceed as the Informal Resolution Facilitator.
- ▶ Promptly bring any concerns you have about your ability to serve as a neutral, unbiased, not conflicted Informal Resolution Facilitator to the attention of the Title IX Coordinator.



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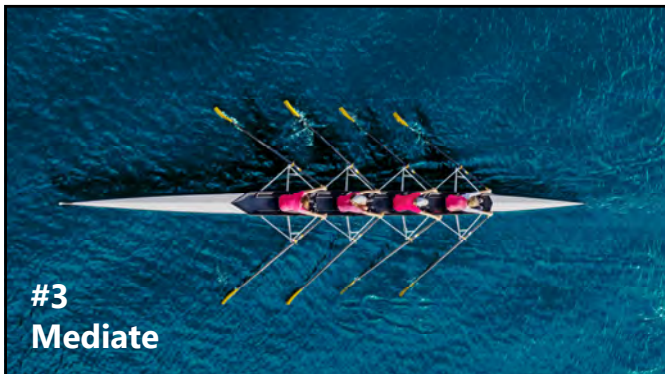
**412**

## Perceptions Matter

- ▶ Consider what others might think, even if you believe you can overcome the appearance of a bias or conflict of interest
- ▶ Give equal time, energy, and interest to both parties
- ▶ Consider your language – and your body language
- ▶ Control your facial expressions



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## #3 Mediate

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## Consider the Format

- ▶ This process can take different forms:
  - ▶ In person, virtual, phone, email
  - ▶ Whole group, simultaneous separate meetings, asynchronous



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## Reach Out to the Parties

- ▶ Can be oral or in writing; use same method for both parties.
- ▶ What is their perspective on the incident(s) at issue?
- ▶ What are their goals for resolution?
- ▶ Are they open to a joint session?
- ▶ Check-in on their supportive measures
- ▶ Ensure the parties understand privacy and confidentiality rules and have no concerns that might impede good faith participation



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## Active Listening


- ▶ Ask prompting questions:
  - ▶ "Why are we here?"
  - ▶ "Tell me more about..."
  - ▶ "Help me understand..."
- ▶ Resist the urge to fill the silence



188

## Respect

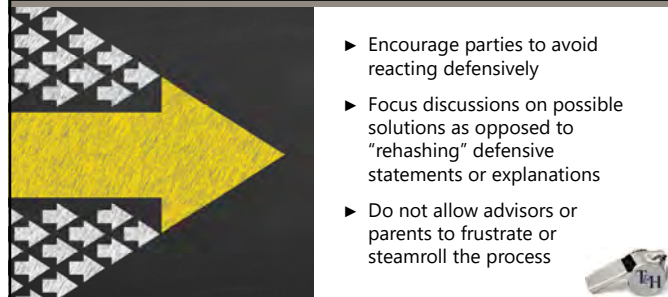
- ▶ Equal treatment for all parties
- ▶ Cultural sensitivity
- ▶ Understand that emotions are high
- ▶ Acknowledge feelings
- ▶ Reasonable and neutral sympathy is okay
  - ▶ "I can tell this is hard for you."
  - ▶ "I'm sorry this is so difficult."



189

## Focus on Resolution


- ▶ Encourage parties to avoid reacting defensively
- ▶ Focus discussions on possible solutions as opposed to "rehashing" defensive statements or explanations
- ▶ Do not allow advisors or parents to frustrate or steamroll the process



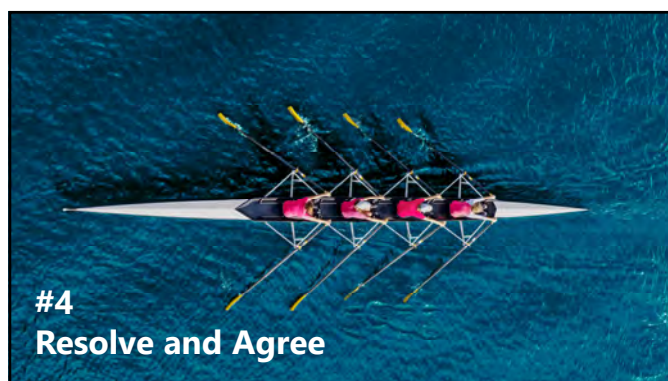
191

## Suggest, Don't Advocate

- ▶ "What terms would help you reach a resolution in this case?"
- ▶ "I want to provide some options to consider, but these are just suggestions to help get/keep the conversation going."



192




#4

## Resolve and Agree

193


### Iron Out Details

- ▶ How long will the Agreement remain in effect?
- ▶ How will this impact physical spaces? Cafeterias, lockers, hallways, common spaces?
- ▶ What about academic and extracurricular spaces?
- ▶ Impact on the parties' respective institutional record?



194

### Plan Ahead




- ▶ What will happen if the agreement is breached?
- ▶ Is it the same consequence for each provision?
- ▶ How will a breach be determined?

195

### Examples of Remedies


- ▶ Provisions similar to Supportive Measures
- ▶ Voluntary restrictions regarding participation in registered student orgs or school events
- ▶ No-contact order
- ▶ Apologies
- ▶ Changes to class schedule, housing, parking, or cafeteria assignments



196

### Examples of Remedies


- ▶ Provisions similar to Supportive Measures
- ▶ Voluntary restrictions regarding participation in registered student orgs or school events
- ▶ No-contact order
- ▶ Apologies
- ▶ Changes to class schedule, housing, parking, or cafeteria assignments
- ▶ Party participates in educational trainings, counseling, or coaching sessions regarding:
  - ▶ consent & communication,
  - ▶ use of alcohol or drugs
  - ▶ healthy interpersonal relationships
  - ▶ stress management & well-being
- ▶ Participation in restorative work



197


### Examples of Remedies

- ▶ Provisions similar to Supportive Measures
- ▶ Voluntary restrictions regarding participation in registered student orgs or school events
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- ▶ Apologies
- ▶ Changes to class schedule, housing, parking, or cafeteria assignments
- ▶ Party participates in educational trainings, counseling, or coaching sessions regarding:
  - ▶ consent & communication,
  - ▶ use of alcohol or drugs
  - ▶ healthy interpersonal relationships
  - ▶ stress management & well-being
- ▶ Participation in restorative work
- ▶ Availability to complainant to read "impact statement" to respondent
- ▶ Voluntary withdrawal from school or transfer to another campus
- ▶ Other measures deemed appropriate by TIX Coordinator




198

### Informal Resolution Agreement



- ▶ Must be reduced to writing and signed by the parties
- ▶ Title IX Coordinator should approve any resolution agreed to by the parties
- ▶ After signing IR agreement, complainant and respondent are bound by the terms and cannot initiate formal Grievance Process



199

## Writing the Agreement

The Informal Resolution Agreement should include the following elements:

- ▶ Summary regarding nature of the formal complaint, allegations, and implicated policies
- ▶ Language reflecting that the agreement is entered into voluntarily and is in lieu of a formal investigation
- ▶ Could include an admission of responsibility
- ▶ A description of the agreed terms
- ▶ A violation clause indicating consequences for violating any part of the agreement



200

## Writing the Agreement

The Informal Resolution Agreement should include the following elements:

- ▶ Any disciplinary dispositions
- ▶ Confidentiality statement
- ▶ Clear language that parties agree to outcomes
- ▶ A notice regarding the institution's commitment to an harassment-free environment and prohibition against harassment and retaliation
- ▶ A place for the Title IX Coordinator and the parties to sign and date the agreement



201

## What Happens Next?

**Written Resolution Agreement**

- ▶ Final and binding on the parties
- ▶ Allegations addressed are considered resolved
- ▶ No further investigation, adjudication, remediation, discipline, or appeal

**No Resolution Agreement**

- ▶ At any time prior to agreeing to a resolution, any party has the right to withdraw from informal resolution process – TIXC notifies other party
- ▶ Parties are referred back to the formal Grievance Process for investigation and determination
- ▶ Complainant may decide to withdraw the complaint

202



203



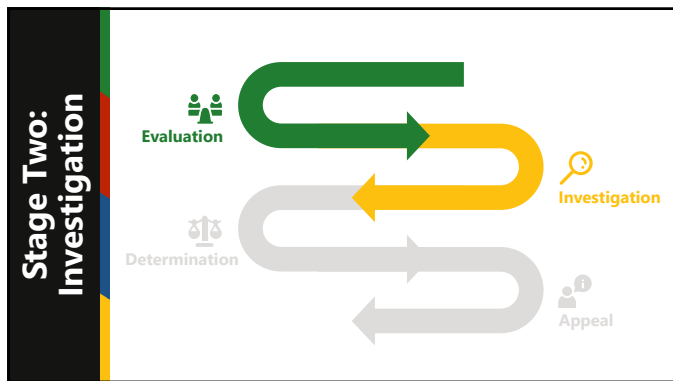
204

When poll is active respond at [PollEv.com/thlaw411](https://PollEv.com/thlaw411) Send [thlaw411](https://t.me/thlaw411) to 22333

Pretest: Title IX investigations and determinations are very similar to other student misconduct investigations and determinations.

Very true	0%
True with some exceptions	0%
Differences outweigh the similarities	0%
Entirely false	0%
I'm not sure yet	0%

205



206

### Key Investigation Principals

- ▶ Thorough
- ▶ Prompt
- ▶ Impartial
- ▶ Fair

207

**An Effective Investigation**  
 →  
**A Reliable Determination**

208

### Investigation Plan

1. Review the file
2. Verify impartiality
3. Introduce yourself to the parties
4. Plan investigation
5. Gather evidence
6. Compile and share "directly related evidence"
7. Draft & share investigation report
8. Transmit file to Title IX Coordinator

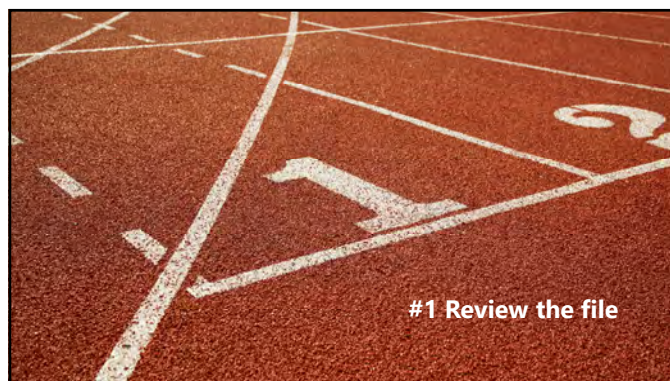
209

When poll is active respond at [PollEv.com/thlaw411](https://PollEv.com/thlaw411) Send thlaw411 to 22333


What is the hardest part about being a Title IX investigator?

Knowing where to start	0%
Getting truthful information from people	0%
Coordinating schedules and finding the time to	0%
Remembering and following all the procedural	0%
Writing the report	0%
Dealing with meddling advisors	0%
None of the above, I've got this	0%

210




211



### Review the File

- ▶ Review all material provided by the Title IX Coordinator
  - ▶ Report
  - ▶ Intake notes
  - ▶ Formal Complaint
  - ▶ Notice of allegations
  - ▶ Supportive measures documentation
  - ▶ Note if either party has an advisor



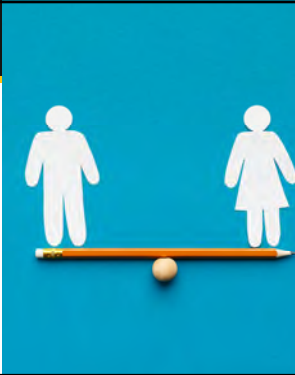
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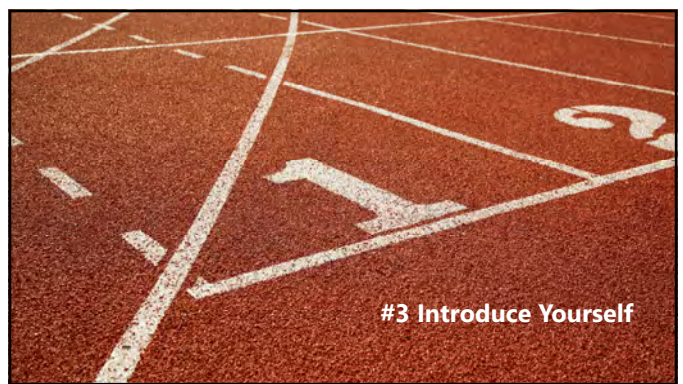
213

### Verify Impartiality

- ▶ An impartial investigator
  - ▶ Is unbiased
  - ▶ Has no conflict of interest
  - ▶ Does not prejudge
  - ▶ Is well trained



214



215



### Introduction

- ▶ Not required, but best practice
- ▶ Benefits:
  - ▶ Notice to the parties of the "rules" for the investigation
  - ▶ Notice to the parties that there may be periods where they do not hear from you, and how they can contact you
- ▶ Send to parties, parents/guardians of minor parties, and advisors, if any

216



217

### Plan Investigation

- ▶ Read the formal complaint, notice of allegations, intake notes, and any other preliminary information provided by the Title IX Coordinator
- ▶ Compare the allegations to the definitions in your Title IX policies and procedures
- ▶ Use the notice of allegations to determine the scope and focus of the investigation



218

### Plan Investigation



- ▶ What questions need to be answered?
- ▶ What evidence do you need to collect?
- ▶ Who should you interview?
- ▶ In what order will you conduct witness interviews?
- ▶ Prepare interview outlines
- ▶ Think: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination?



219

### What do you need to know?

- ▶ Think back to the Title IX definitions of "Title IX sexual harassment" "in an educational program or activity" and "against a person in the U.S."
- ▶ Look at the allegations and consider what the elements for each claim are
- ▶ Consider information needed to craft a remedy if a violation is found

220


### Where will you find evidence?

- ▶ Who may have information?
- ▶ Who will you question first?
- ▶ Is there a recording?
- ▶ Are there texts or social media communications or posts?
- ▶ Identify and preserve evidence at risk of loss
- ▶ Contact law enforcement immediately if there is knowledge of illegal or illicit evidence




221

### Scope of Investigation



- ▶ If there are additional allegations → Title IX Coordinator will need to amend the notice of allegations
- ▶ If there are additional complainants or respondents → Title IX Coordinator will need to reach out to determine if there will be a Title IX complaint, provide all necessary notices and supports, and decide if consolidation is proper or if there will be separate investigations



222



223

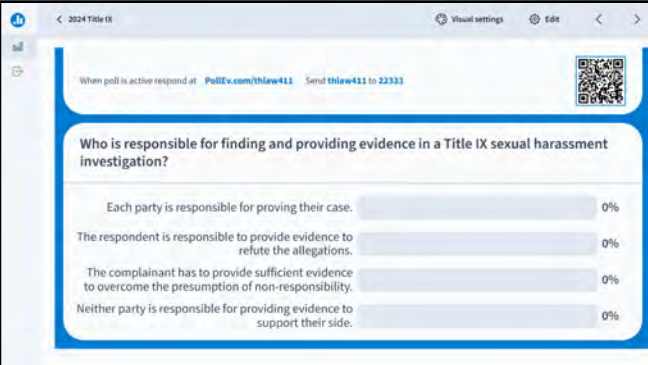
## Notice of Interview



- ▶ Institution must provide the parties written notice of the **date, time, location, participants, and purpose** of all investigative interviews or other meetings with sufficient time to prepare
- ▶ Recommended to do the same for non-party witnesses (not required)



224



When poll is active respond at [PollEv.com/titleix411](https://PollEv.com/titleix411) Send titleix411 to 22323

Who is responsible for finding and providing evidence in a Title IX sexual harassment investigation?

Each party is responsible for proving their case.	0%
The respondent is responsible to provide evidence to refute the allegations.	0%
The complainant has to provide sufficient evidence to overcome the presumption of non-responsibility.	0%
Neither party is responsible for providing evidence to support their side.	0%

225

## YOU ARE!



- ▶ The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the educational institution, not the parties
- ▶ But if parties want to provide evidence, let them. Do not discourage parties from submitting evidence
- ▶ Give all parties the same opportunity to present evidence, suggest witnesses, and recommend directions for your investigation
- ▶ If you decide not to pursue a suggested route, record your reasons





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## Types of Evidence

- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

Rumor / innuendo (NOT evidence)





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## Direct Evidence

Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident




I saw Johnny swimming in the lake.



228


## Circumstantial Evidence

Evidence based on inference and not on personal knowledge or observation ... all evidence that is not given by eyewitness testimony.




I saw Johnny walking off the pier, wrapped in his towel, with wet hair.

He must have been swimming.



229

## Hearsay Evidence



A statement (oral or written) made by someone other than the person you are interviewing and that is offered to prove the truth of the matter asserted in the statement.

Holly: Kendra said she saw Johnny swimming in the lake.

230

## Sources of Evidence

- ▶ Interviews
- ▶ Testimony
- ▶ Documents
- ▶ School records
- ▶ Campus files
- ▶ Personnel files
- ▶ Investigation records
- ▶ Student files
- ▶ Police Reports
- ▶ Emails
- ▶ Handwritten notes
- ▶ Calendars
- ▶ Photographs
- ▶ Videos
- ▶ Text & instant Messages
- ▶ Other electronic files/ cloud storage
- ▶ Journal entries
- ▶ Medical records (ONLY with written consent)

231

## Conduct Productive Interviews


**PREPARATION IS KEY!**

- ▶ Prepare a focused and targeted interview outline
- ▶ Focus on the allegations of sexual harassment and the questions you need to answer to reach a conclusion
- ▶ Identify "must ask" questions to elicit information related to the allegations and questions you have identified
- ▶ Identify evidence to discuss with witness
- ▶ Prepare questions to obtain a reliable chronology of events and all relevant information that witness has
- ▶ Avoid extraneous questions that seek information that is not relevant

232

## Game Plan for Interviews

- ▶ Determine how you are going to establish rapport
- ▶ Where are you going to conduct the interview? Will it make the witness feel comfortable?
- ▶ Are you going to have others present? Who?
- ▶ How are you going to open the interview?
- ▶ Set notice of rights/expectations?
- ▶ To record or not to record?



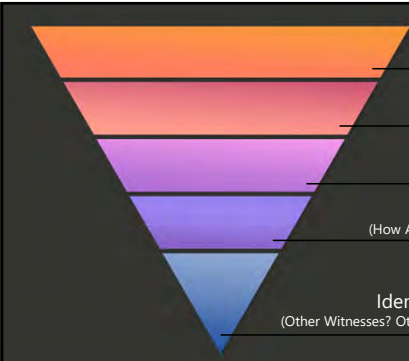
233

## Interviews

- ▶ Who do we interview?
- ▶ In what order should we conduct the interviews?

Complainant
Witnesses you identified (campus personnel, other students)
Witnesses identified by complainant
Respondent
Witnesses identified by respondent

234



- Background Questions
- Narrative  
(What Happened? The Allegations)
- Targeted Questions  
(Clarification; "Fill In the Gaps")
- Any "Must Ask" Questions  
(How Allegations Relate to Key Title IX Issues)
- Identify Any Needed Follow-Up  
(Other Witnesses? Other Evidence? Anything Else to Share?)

235

### Interview Dos & Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> <li>✓ Make party/witness feel at ease</li> <li>✓ Be neutral, objective, and open-minded</li> <li>✓ Listen <u>actively</u></li> <li>✓ Let the interviewee tell their story</li> <li>✓ Take all allegations and statements seriously</li> <li>✓ Be thorough – make sure to elicit all relevant facts</li> </ul>	<ul style="list-style-type: none"> <li>✗ Create a hostile or unwelcoming environment</li> <li>✗ Have an agenda</li> <li>✗ Be a passive interviewer</li> <li>✗ Do all the talking</li> <li>✗ Rush to judgment or dismiss allegations or statements</li> <li>✗ Make determinations based on sex-stereotyping or status</li> </ul>

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### More Interview Dos & Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> <li>✓ Ask all necessary follow-up questions</li> <li>✓ Ask probing questions</li> <li>✓ Seek information regarding potential justifications/excuses</li> <li>✓ Test the credibility of the statements in the interview</li> <li>✓ Ask for supporting documents and/or corroborating witnesses</li> </ul>	<ul style="list-style-type: none"> <li>✗ Shy away from asking tough questions</li> <li>✗ Conduct an interrogation</li> <li>✗ Be argumentative or accusatory</li> <li>✗ Be unprepared</li> <li>✗ Conduct the interview without reference to any documentation or other evidence</li> </ul>

237



### Impermissible Evidence

- ▶ Evidence protected by a legal privilege
- ▶ Health care treatment records

**MUST OBTAIN WAIVER!**

- ▶ Complainant's sexual predisposition, or prior sexual behavior (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used

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### Privileged or Confidential

- ▶ Information protected by a recognized federal or state law, such as attorney-client privilege, doctor-patient privilege, or spousal privilege may not be sought, used, or relied on
- ▶ Unless the person holding the privilege has waived it



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### Healthcare Treatment Records



- ▶ Healthcare treatment records made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment may not be accessed, considered, or used
- ▶ Unless the student (parent) provides voluntary written consent
- ▶ Medical records previously provided to the school related to a 504 disability and accommodation request become student records and are not impermissible

240

### Complainant's Sexual Predisposition and Prior Sexual Behavior



- ▶ Questions and evidence related to a complainant's sexual predisposition or prior sexual behavior are **impermissible** and may not be asked or sought
- ▶ Exceptions: Evidence related to the complainant's prior sexual behavior
  - Offered to show someone other than the respondent committed the alleged conduct
  - Related to the sexual behavior between the complainant and respondent and offered to prove consent
- ▶ **However**, the fact of prior sexual conduct between the parties does not, by itself, demonstrate or imply the complainant's consent to the alleged sex-based harassment

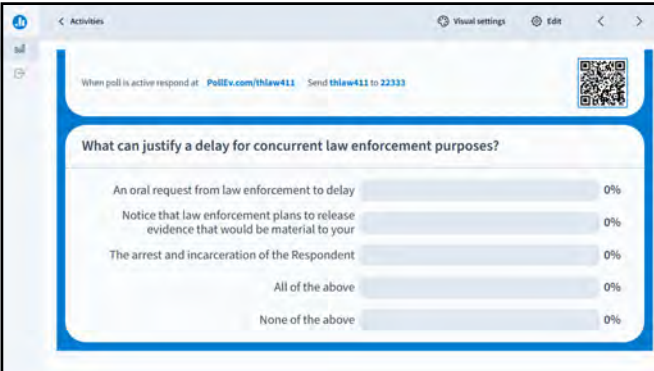
241

## Roadblocks: Police Involvement

- ▶ The college/university must conduct its Title IX investigation in a "reasonably prompt" manner but may temporarily delay the investigation for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending
- ▶ Provide notice of any delay to the parties




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## When the Police Call






- Document everything!
- Ask police to put request for delay in writing
- Reduce verbal (e.g., telephone) conversations in writing
- Best practice is to respond with summary/"If my summary is incorrect, please let me know by [date] or I will assume it is correct."
- Explain in writing the school's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- Follow up, then follow up again, then again

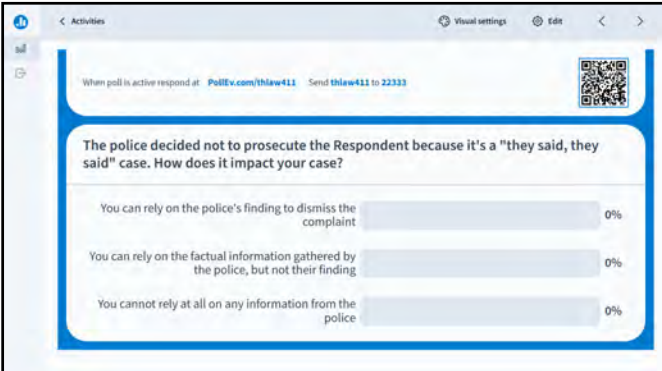
244

## Notice of Delay

- ▶ The college/university must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is not good cause to delay sending the written notice of allegations to the complainant or respondent


245



246

## Police Evidence?



- ▶ Police evidence may be useful for *initial* fact-gathering
- ▶ They are not a substitute for your own required investigation
- ▶ The standards for and purposes of criminal investigations are different from institutional investigations
- ▶ Police investigations or reports are not determinative and you need your own evidence-gathering to determine whether there was Title IX sexual harassment or whether the respondent is responsible



247

### Fill In the Gaps

- ▶ Are there any gaps in your chronology of events?
- ▶ Is there any evidence missing?
- ▶ Did you obtain all the documents and information the parties and witnesses referenced?
- ▶ Are there any follow-up questions you need to ask the parties or witnesses?
- ▶ Is there anything else you need to track down to prepare that will allow you (or the decisionmaker) to reach a reliable determination?

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**#6 Compile and Share Directly Related Evidence**

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### Compile & Share Directly Related Evidence


- ▶ "Directly related evidence" is not defined in the rules
- ▶ Statements, notes of interviews, and other types of evidence collected in the investigation are likely covered
- ▶ The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- ▶ The investigator must consider the responses when writing the investigative report



250

### Prevent Disclosure

- ▶ Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- ▶ Take reasonable steps to prevent and address the parties' unauthorized disclosure of information and evidence obtained solely through the grievance process



251

### Except...

- ▶ Do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- ▶ Disclosures for purposes of administrative proceedings or litigation related to the allegations are authorized



252

Should witness names be redacted from the directly-related evidence and investigation report?

Yes	0%
No	0%
Yes for students, but not for staff	0%
Yes for minor students, but not for adult students or staff	0%

Start the presentation to see how to interact with the screen, share the entire screen, get help at gethelp.com/help

253



254



### Prepare & Share Investigation Report

- ▶ You can (and should) begin drafting the report during the 10-day DRE period
- ▶ The report must summarize all "relevant evidence" (which may be different from the "directly related evidence")
- ▶ The report must respond to the parties' responses to the investigation report
- ▶ The report must be shared with the parties, who will have 10 days to respond before a decision




255

## "Relevant"

Evidence is relevant if:

- (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and;
- (b) the fact is of consequence in determining the action.

Includes "inculpatory" and "exculpatory" evidence

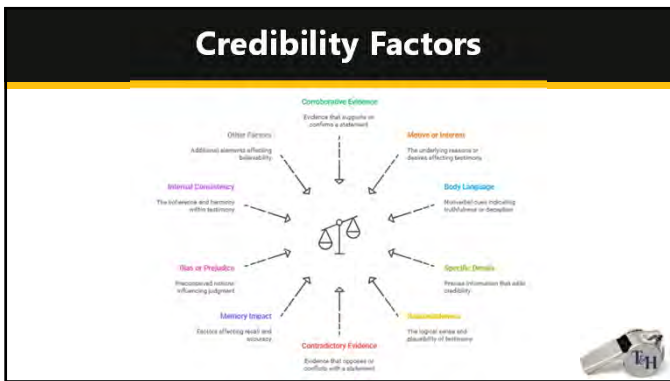


256



The investigator does not make **findings** regarding credibility, but you should include information in the investigative report to help the decisionmaker assess credibility

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## Consider the Parties' Responses

ASK YOURSELF

- ▶ Did either party identify evidence that was absent or not gathered?
- ▶ Did either party identify new witnesses or new evidence?
- ▶ Did either party point out inconsistencies in the evidence?
- ▶ Did either party raise concerns regarding the relevance of the evidence?



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### Finalize & Share the Report

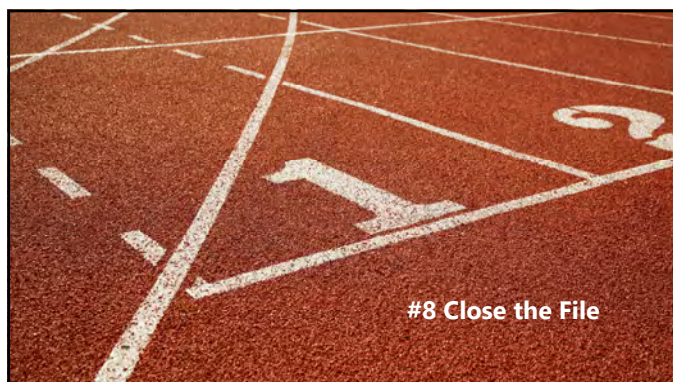
- ▶ The report does not reach a decision/determination, that is the decision-maker's role
- ▶ The educational institution must share the final report with both parties and their advisors
- ▶ Take reasonable steps to protect the privacy of parties and witnesses during the grievance process
- ▶ EXCEPT, do not restrict the ability of parties to obtain evidence, speak to witnesses, or consult family members, advisors, or confidential resources
- ▶ Both parties must be given at least 10 days to review and respond before a final decision

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### Investigator Dos and Don'ts

DOs	DON'Ts
<ul style="list-style-type: none"> <li>✓ Ensure you have no conflict of interest or bias and remain impartial</li> <li>✓ Treat all parties equitably</li> <li>✓ Provide an equal opportunity to the parties to present evidence and witnesses</li> <li>✓ Objectively evaluate all evidence for relevance</li> <li>✓ Know the elements and definitions of the type of alleged sexual harassment and identify the key factual issues</li> <li>✓ Conduct a complete and thorough investigation, identify and address any gaps</li> <li>✓ Ensure your summary of the relevant and not otherwise impermissible evidence is thorough and accurate</li> </ul>	<ul style="list-style-type: none"> <li>✗ Conduct surprise interviews</li> <li>✗ Discriminate in the investigation or rely on stereotypes or preconceived notions</li> <li>✗ Delay or extend the investigation timeline absent good cause</li> <li>✗ Restrict the parties' ability to discuss allegations or gather evidence</li> <li>✗ Shy away from asking tough questions</li> <li>✗ Be accusatory or argumentative</li> <li>✗ Seek or use impermissible evidence, unless there is a waiver or applicable exception</li> <li>✗ Violate the parties' confidentiality</li> </ul>

261

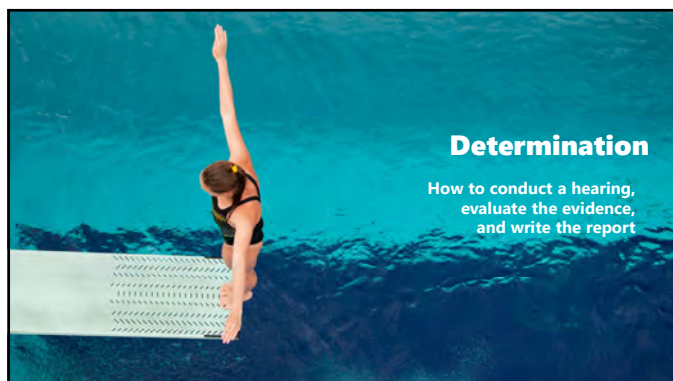


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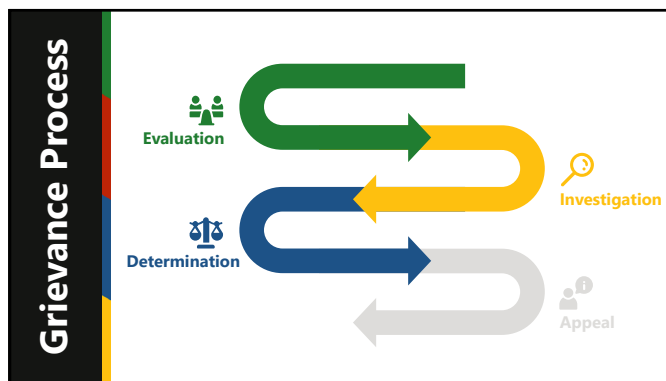
### Close the File

- ▶ Files related to a Title IX complaint must be maintained for seven years
- ▶ Finalize the file and transmit it to the Title IX Coordinator or their designee for the case
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now
- ▶ Think broadly!


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265

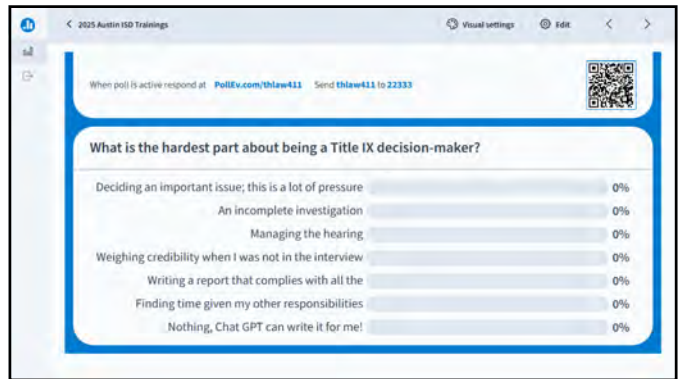


### Decisionmaking Framework

- Step 1:**  
Learn the Case
- Step 2:**  
Verify Impartiality
- Step 3:**  
Live Hearing
- Step 4:**  
Evaluate Evidence
- Step 5:**  
Prepare Written Determination



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2025 Austin ISD Trainings

When poll is active respond at [Polls.com/thlaw411](https://polls.com/thlaw411) Send [thlaw411](https://t.me/thlaw411) to 22333

What is the hardest part about being a Title IX decision-maker?

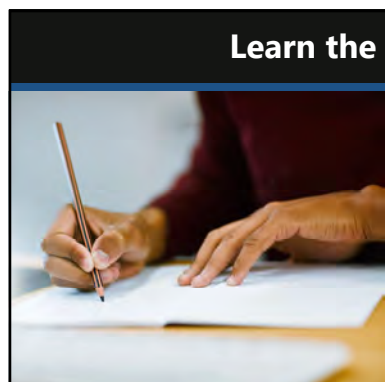
Deciding an important issue; this is a lot of pressure	0%
An incomplete investigation	0%
Managing the hearing	0%
Weighing credibility when I was not in the interview	0%
Writing a report that complies with all the	0%
Finding time given my other responsibilities	0%
Nothing, Chat GPT can write it for me!	0%

267




### Step 1: Learn the Case

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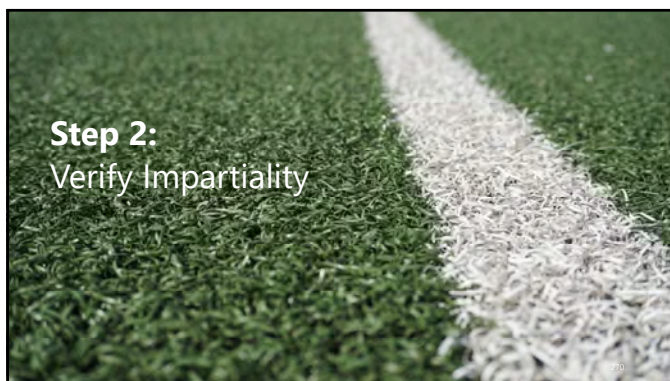


### Learn the Case

- ▶ Review the file:
  - ▶ Formal Complaint
  - ▶ Written Notice of Allegations
  - ▶ Directly Related Evidence
  - ▶ Party Responses to Directly Related Evidence
  - ▶ Investigation Report
  - ▶ Relevant Policy

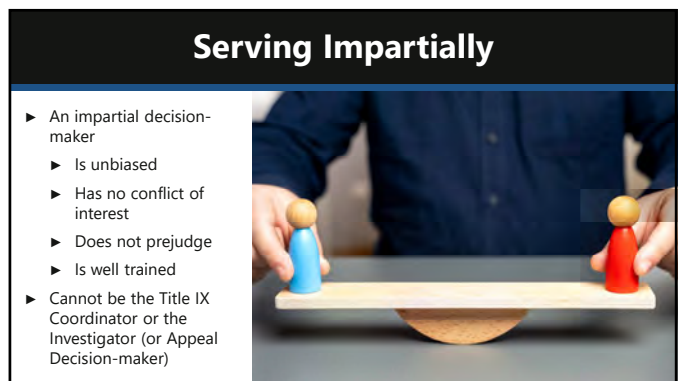


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### Step 2: Verify Impartiality

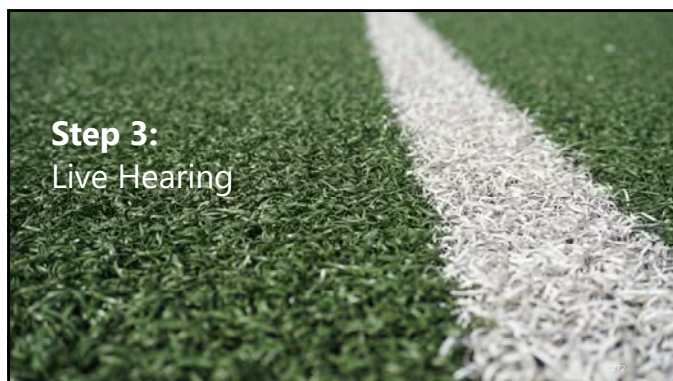
270



### Serving Impartially

- ▶ An impartial decision-maker
  - ▶ Is unbiased
  - ▶ Has no conflict of interest
  - ▶ Does not prejudge
  - ▶ Is well trained
- ▶ Cannot be the Title IX Coordinator or the Investigator (or Appeal Decision-maker)

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## The Hearing

---

Required for post-secondary education (PSE) institutions

---

Can be in person or by videoconference

---

If offered in person, must provide videoconference if requested

---

Must include live cross-examination by an advisor

---

Must be audio or audio-visually recorded or transcribed

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### Structuring the Hearing

- Ground Rules/Questions?
- Opening Statements? By whom?
- Who asks questions first? (Decision-Makers, Advisors? Which party goes first?)
- Closing Statements? By whom?

274

What if a party presents new evidence, not in the DRE or investigation report, at the hearing?

The decisionmaker should allow it to avoid a due process challenge	0%
The decisionmaker should allow it if the parties agree	0%
The decisionmaker should not allow it and should continue the hearing	0%
The decisionmaker should not allow it but should remand the case to investigation	0%
Other (put details in chat)	0%

(Don't forget to use the controls on screen: share software, share the entire screen, Get help if getting confused)

275

# NOTICE

**Notice of Hearing**

- Send notice of hearing to the parties, including date, time, location, purpose, and individuals who will be present
- Recommend scheduling a pre-hearing conference (make sure to provide notice of this meeting, too)

276

### Individuals Involved

- ▶ Parties
- ▶ Each party's advisor (can be but is not required to be an attorney)
- ▶ Decision-Maker(s)
- ▶ Witnesses (including Investigator(s))
- ▶ Institutional Representative (Facilitator)?
- ▶ Support Person?

277

### Administration

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- Recording or transcribing

---


- Notifying witnesses of attendance

---

- If the hearing is held in person, physical facilities, technology, etc.

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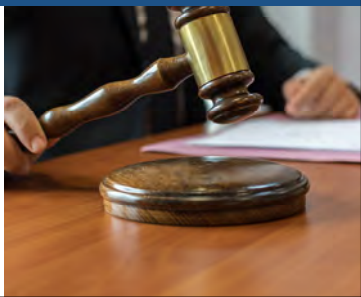
- Deliberations



278

### Decorum


- ▶ Can have expectations for decorum for parties, advisors, witnesses, and support persons
- ▶ Consider your decorum as well




279


### Cross-Examination

- ▶ At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.
- ▶ Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.
- ▶ Only relevant cross-examination and other questions may be asked of a party or witness.
- ▶ Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.




280

### Ruling on Questions




The decision-maker (or hearing chair if multiple decision-makers) must review each question before an answer to determine whether it is **relevant and respectful**.




281

### Relevance



Relevant evidence is evidence that has value in proving or disproving a fact at issue and includes both inculpatory and exculpatory evidence.

- ▶ Facts that help prove or disprove an undisputed issue of fact are not relevant
- ▶ Questions that are duplicative of other questions or evidence are not relevant
- ▶ Even if a fact or issue is in dispute, a question is not relevant if it does not "tip the scale" one way or the other in favor of or against the issue in dispute.



282

### Impermissible Evidence



- ▶ Evidence protected by a legal privilege
- ▶ Health care treatment records  
**MUST OBTAIN WAIVER!**
- ▶ Complainant's sexual predisposition, or prior sexual behavior (unless exception)

Impermissible evidence must not be considered (except to determine exception) and must not be disclosed or used



283

### Respectful


Cannot use profanity or irrelevant, ad hominem attacks

---

Harassing questions will not be tolerated

---


No written notice required, but recommend providing



284


### Non-Relevant or Disrespectful Questions

- ▶ Must explain the reason for finding a question not relevant
- ▶ Examples:
  - ▶ "The question seeks information protected by a legally recognized privilege"
  - ▶ "The question includes irrelevant personal attacks"
  - ▶ No ruling required for questions that are not respectful; but recommended




285

### Non-Relevant or Respectful Questions

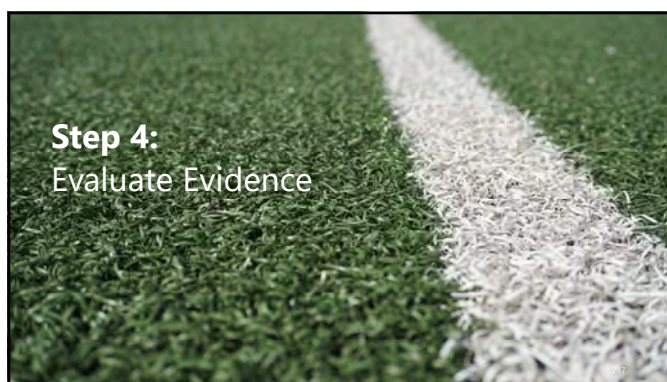


- ▶ Not required to give parties an opportunity to restate their question
- ▶ If you do so, we recommend providing only one opportunity

Try & Try Again




286




287

### Standard of Proof



"Preponderance of the Evidence"

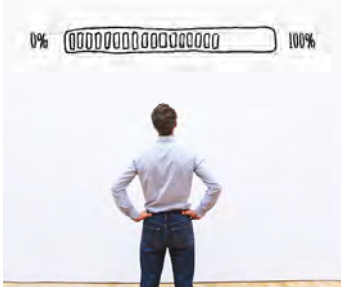
More likely than not.  
(50% + a feather)



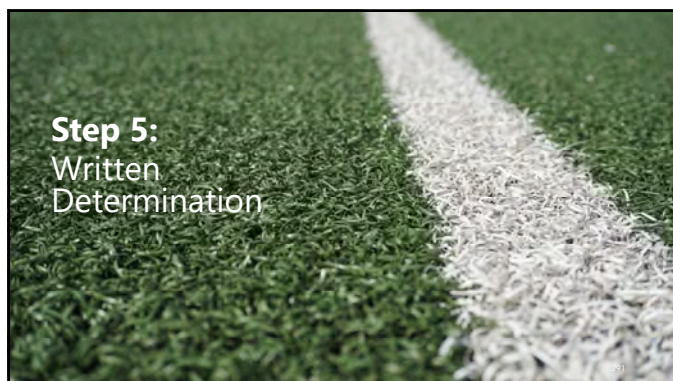
288

### Determination

- ▶ Decisionmaker evaluates relevant, not impermissible evidence for its persuasiveness
- ▶ If not persuaded under the standard by the evidence that sexual harassment occurred, whatever the quantity of the evidence is, the decisionmaker must not determine that sexual harassment occurred




289




291

### Written Determination



- ▶ The decision-maker(s) must issue a written determination regarding responsibility containing specific requirements.




292

- ✔ Identify the allegations potentially constituting sexual harassment


**Written Determination Requirement**  
**Number One**

293

### Allegations



- ▶ Will be provided to you – should be in the “notice of allegations” sent to both parties upon receipt of a formal complaint *and* in the investigation report
- ▶ Must be restated in the written determination



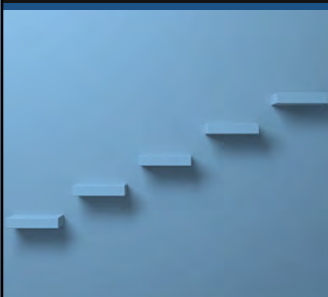
294

- ✔ Describe procedural steps taken from the receipt of the formal complaint through the determination


**Written Determination Requirement**  
**Number Two**

295

### Procedural Steps



- ▶ Notifications to the parties
- ▶ Interviews with parties and witnesses
- ▶ Site visits
- ▶ Methods used to gather evidence
- ▶ Much (but not all) of this will be in investigation report
- ▶ Must include all procedural steps in written determination
- ▶ Ask Coordinator for assistance finding missing steps



296

✓ Findings of fact supporting the determination

**Written Determination Requirement Number Three**

297

**Findings of Fact**

Facts

- 1 \_\_\_\_\_
- 2 \_\_\_\_\_
- 3 \_\_\_\_\_
- 4 \_\_\_\_\_

- ▶ Identify the undisputed facts related to an issue
- ▶ Identify the first disputed fact related to an issue
  - ▶ Explain each party's position and any evidence relevant to the fact
  - ▶ State your conclusion as to what happened with the first disputed fact
  - ▶ Explain your reasoning, including credibility determinations
- ▶ Move to the next disputed fact
- ▶ Decide the overall issue
- ▶ Repeat for any other disputed issues

298



299



300

**They Said/They Said**

- ▶ Sexual harassment often occurs behind closed doors
- ▶ There are often no witnesses to the alleged harassment
- ▶ Many cases are going to involve the complainant making certain allegations, the responding denying them, with no other witness
- ▶ **The fact that there are no witnesses to the alleged harassment does not mean it is automatically a "50/50"**
- ▶ A thorough investigation and effective hearing questions can help the decisionmaker assess credibility and reach a reliable determination

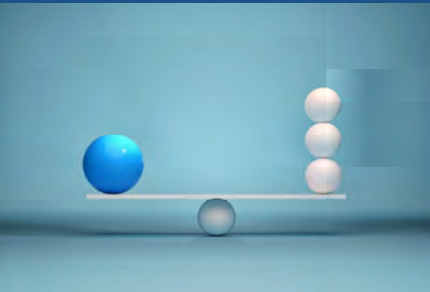
301



302


### They Said/They Said

- ▶ Very few cases end in 50/50
- ▶ More common for a particular disputed fact to end in 50/50, but even that happens less than one might think
- ▶ What tips the scale one way or another?



303

### Credibility




- ▶ In the decision-making process, credibility refers to the process of weighing the accuracy and veracity of evidence
- ▶ Relevant evidence tips the scale (even a feather)
- ▶ Credibility determines how much the scale is tipped – a feather or an elephant

304

### Credibility ≠ Truthful

- ▶ Just because you don't find a witness credible does not mean they are a liar
- ▶ We all remember experiences differently and have different perspectives that shape how we view in
- ▶ Think about your last fight with a loved one or close friend...



305

Rank these witnesses in order of believability (most believe to least believable)

- A nun
- A tenured professor
- An adjunct professor
- An administrator
- A star athlete
- A person with a disciplinary or criminal record
- A police officer


306

- ✔ Conclusions regarding the application of the educational institution's code of conduct to the facts


**Written Determination Requirement**  
**Number Four**

307

### Applying the Code



- ▶ The Title IX Coordinator should have previously determined that the conduct alleged, if true, is covered by Title IX
- ▶ However, the written determination must include the analysis of the conduct established
- ▶ Remember to make findings with respect to each element of the alleged misconduct
- ▶ Refer to definitions in the policy



308

✓ A statement of, and rationale for, the result as to each allegation

**Written Determination Requirement Number Five**

309


**Results**



- ▶ A determination regarding responsibility
  - ▶ The reasons for the determination
- ▶ A list of sanctions imposed on the respondent
  - ▶ The reasons for the sanctions
- ▶ Whether remedies provided to the complainant (do not list; communicate privately to the complainant)
  - ▶ The reasons for the remedies

310

**Determination & Discipline**



- ▶ Complete the investigation and determination before the imposition of any disciplinary sanctions against a respondent
- ▶ Do not discipline a party, witness, or others participating in the grievance process for making a false statement or for engaging in consensual sexual conduct based solely on the determination of whether sexual harassment occurred

311

**Sanctions**

- ▶ Disciplinary:
  - ▶ Suspension
  - ▶ Expulsion
  - ▶ Probation
  - ▶ Loss of privileges
- ▶ Rehabilitative:
  - ▶ Counseling
  - ▶ Training
  - ▶ Community service

*I will not misbehave in class!*

*I will not misbehave in class!*

*I will not misbehave in class!*

*I will not misbehave in class!*

*I will not misbehave in class!*


*I will not misbehave in class!*

*I will not misbehave in class!*

312

**Remedies**

- ▶ Remedies must be individualized to restore a complainant's equal access to the education program or activity
- ▶ Remedies can also be more wide-spread when multiple people were impacted by the sexual harassment, especially when the allegations related to a policy, procedure, or practice of the school



313

**Remedies**

- ✓ Providing a campus escort for the complainant
- ✓ Allowing the complainant to park in the employees' parking lot
- ✓ Changing class schedules or extracurricular activities to ensure the complainant and respondent are separated
- ✓ Providing academic resources, modifications, and support

- ✓ Implementing or extending no-contact orders or "stay away agreements"
- ✓ Providing or coordinating health services and counseling
- ✓ Providing training or educational programs to individuals, school groups, personnel, or the school community
- ✓ Modifications to policies, procedures, or practices

314

✓ Process for Appeal

**Written Determination Requirement Number Six**

315

**Process for Appeal**

▶ Provide the bases for appeal, timeline to file an appeal, and method to do so

316

✓ Provide the written determination to the parties simultaneously

**Written Determination Requirement Number Seven**

317

**What about FERPA?**

▶ OCR states that sharing the result as to each allegation including a list of sanctions is permitted by FERPA because sanctions “always directly impact the victim”

▶ Remedies do not directly affect the respondent so should be communicated separately to the Complainant

318

**Decisionmaker Dos and Don'ts**

<b>DOs</b>	<b>DON'Ts</b>
<ul style="list-style-type: none"> <li>✓ Explain the process to parties and advisors</li> <li>✓ Assume respondent is not responsible</li> <li>✓ Exercise independent judgment and objectively evaluate all relevant evidence</li> <li>✓ Follow your grievance procedure</li> <li>✓ Make credibility determinations and evaluate the weight of the evidence using preponderance standard</li> <li>✓ Make a clear determination regarding whether the respondent violated the school's policies</li> </ul>	<ul style="list-style-type: none"> <li>✗ Prejudge the facts or rush to judgment</li> <li>✗ Consider impermissible evidence unless a waiver or exception applies</li> <li>✗ Rely on stereotypes or preconceived notions when making credibility determinations or weighing the evidence</li> <li>✗ Delay or extend the decision timeline absent good cause</li> <li>✗ Neglect to provide the rationale for the determination</li> </ul>

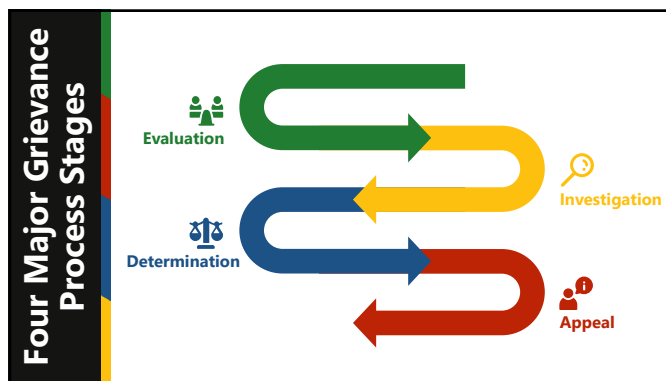
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**Time Out**

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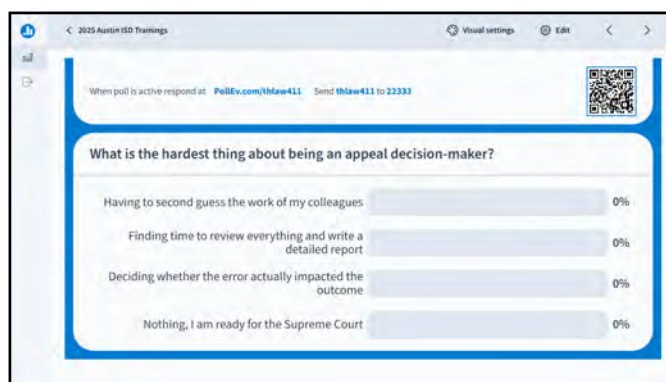
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322

Appeal Basics			
Who	Why?	Appeal Decisionmaker	Steps
<ul style="list-style-type: none"> <li>Any party can appeal a dismissal or determination</li> </ul>	<ul style="list-style-type: none"> <li>Based on                             <ul style="list-style-type: none"> <li>procedural irregularity that affected the outcome</li> <li>new evidence not available at the time of the determination that could affect the outcome</li> <li>bias/conflict of interest that affected the outcome</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Cannot be Title IX Coordinator, Investigator, or initial Decision-Maker</li> <li>Must be trained</li> </ul>	<ul style="list-style-type: none"> <li>Notify parties when appeal is filed</li> <li>Implement appeal procedures equally for the parties</li> <li>Give parties a reasonable and equal opportunity to make a statement in support of or challenging the dismissal or determination</li> <li>Notify all parties of result of appeal and rationale for the outcome</li> </ul>

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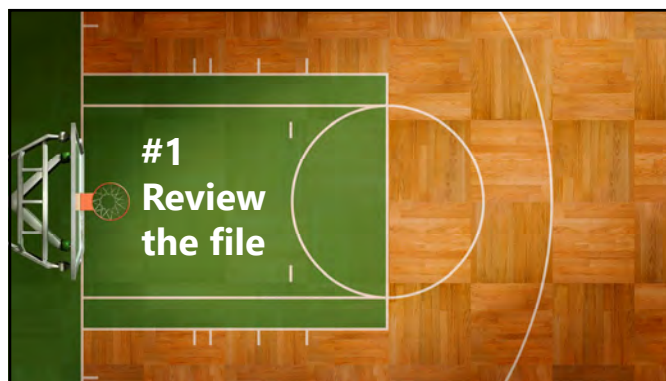


324

**Appeal Process**

1. Review File
2. Verify Impartiality
3. Determine Appeal Validity
4. Notify Parties
5. Analyze Appeal
6. Write Appeal Determination
7. Close the file



325



326

### Review File

- ▶ Review all material provided by the Title IX Coordinator
- ▶ Appeals are not de novo
- ▶ Confine the review to the record + appeal documents

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### #2 Verify impartiality



328

### Verify Impartially

- ▶ An impartial appeal decision-maker
  - ▶ Is unbiased
  - ▶ Has no conflict of interest
  - ▶ Does not prejudge
  - ▶ Is well trained
- ▶ Cannot be the Title IX Coordinator, Investigator, or Decision-maker

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### #3 Determine validity



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### Determine Validity of Appeal

- ▶ The appeal must be on one of the three authorized bases:
  1. Procedural irregularity + affected outcome
  2. New evidence + could have affected outcome
  3. Bias or conflict of interest + affected outcome
- ▶ Also consider whether the appeal is **timely** (consider your policy or timelines in determination of responsibility)




331

### Who Decides?



Title IX Coordinator or appellate decisionmaker?


If a dismissal is appealed, the Title IX Coordinator or designee who dismissed the complaint should not decide the validity of the appeal



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### Procedural Error

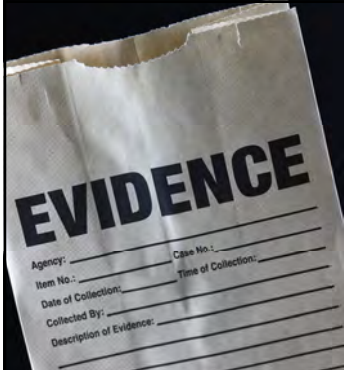
- ▶ Did the appealing party identify a procedural irregularity?
  - ▶ Failure to follow policy/procedure steps
  - ▶ Failure to analyze all relevant evidence
  - ▶ Inappropriate disqualification of evidence or questions
- ▶ Did the appealing party identify how they believe the error affected the outcome/decision made?



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### New Evidence

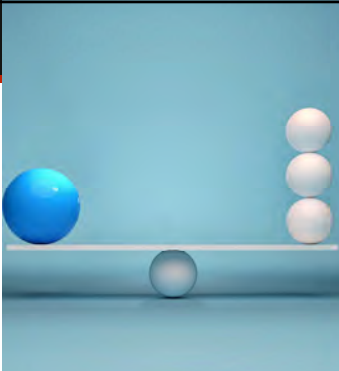
- ▶ Did the appealing party identify new evidence that wasn't reasonably available at the time the decision being appealed was made?
- ▶ Did the appealing party identify how they believe the new evidence could impact the outcome/decision made?



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### Bias or Conflict


- ▶ Did the appealing party identify an alleged bias or conflict of interest by a Title IX team member?
- ▶ Did the appealing party identify how they believe the bias or conflict affected the outcome?



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### Evaluation

- ▶ Evaluation just considers whether a valid appeal basis is being raised
- ▶ It does not address the "weight" of the argument (how persuasive it is)



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### #4 Notify parties



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### Notify the Parties


- ▶ If the appeal is valid:
  - ▶ Must notify both parties of appeal in writing
  - ▶ Can be from the Title IX Coordinator
- ▶ Must provide the parties equal opportunity to submit written statements for or against the appeal
  - ▶ Consider using an appeal form that requests "just the facts"
  - ▶ Then request a written statement from both parties
  - ▶ Avoids the appealing party feeling cheated that they did not get to respond the responding party's appeal statement



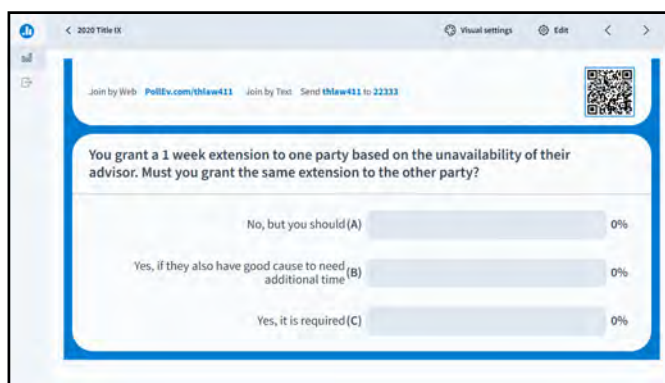
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## Stick to Timeframes

- ▶ Grievance process must include reasonably prompt time frames, including for filing and resolving appeals
- ▶ You can temporarily delay time frames for the grievance process temporarily for good cause with written notice
- ▶ Must provide written notice of delay to all parties (complainants & respondents)
  - ▶ Must include reason for and length of delay
- ▶ When deciding whether to grant a delay or extension, consider the interests of:
  - ▶ Promptness
  - ▶ Fairness to the parties
  - ▶ Accuracy of adjudications



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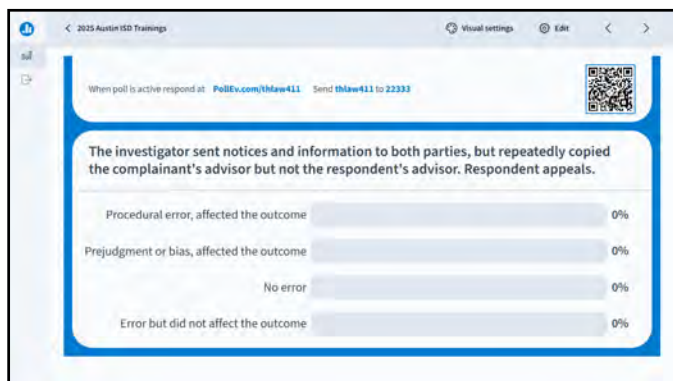
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## Analyze the Appeal

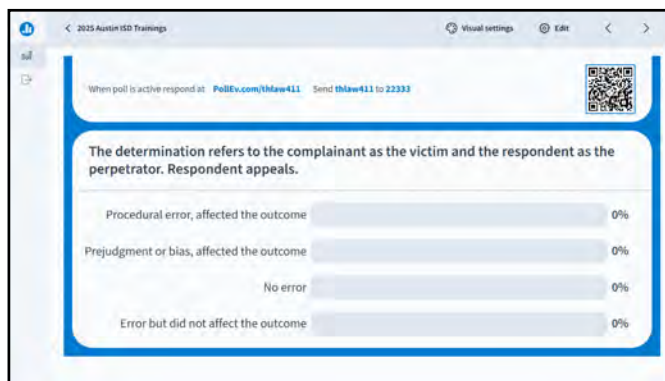
- ▶ This is where you consider the “weight” and persuasiveness of the arguments made in the appeal
- ▶ Make sure to consider arguments raised by both sides
- ▶ Typical appeal issues:
  - ▶ Dismissals
  - ▶ Second-Guessing
  - ▶ New Evidence
  - ▶ Impartiality



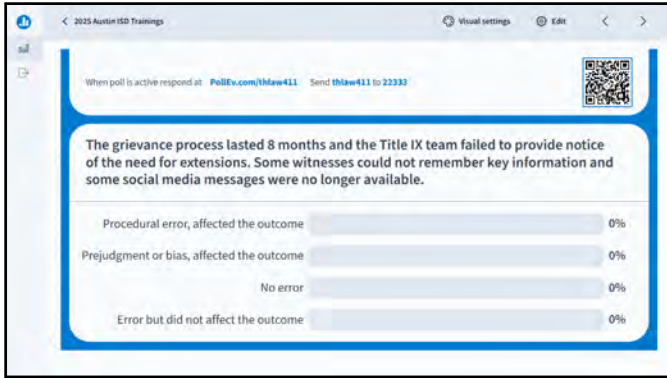
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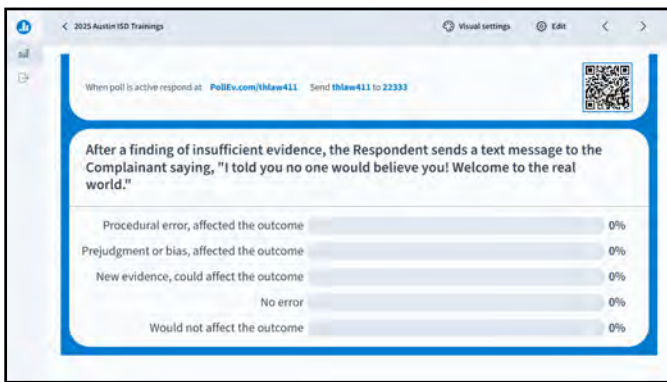
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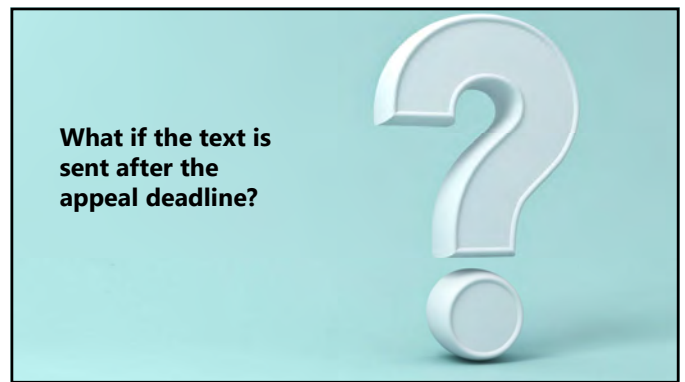
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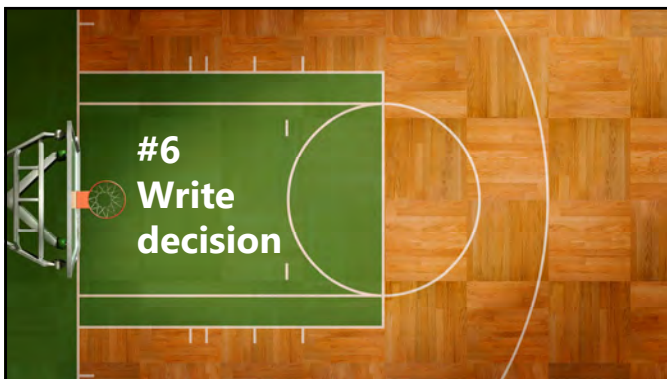
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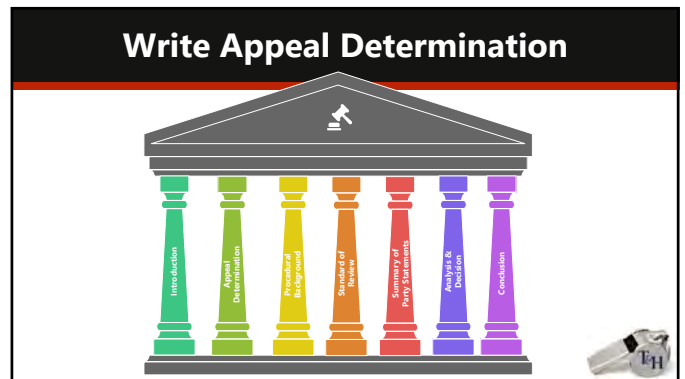
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### Analysis & Decision

- ▶ Consider all factors for/against the appeal basis/argument – **SHOW YOUR WORK!**
- ▶ Include policy definitions and procedural requirements
- ▶ Assess whether there is sufficient evidence of impact on the outcome
- ▶ Remember the preponderance of the evidence standard



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### Affirm, Reverse, or Remand

Affirm	Reverse	Remand
<ul style="list-style-type: none"> <li>• No error or</li> <li>• The error could not have impacted the outcome</li> </ul>	<ul style="list-style-type: none"> <li>• The appeal makes clear the decision was incorrect</li> </ul>	<ul style="list-style-type: none"> <li>• More information is needed</li> <li>• Return to the investigation or determination stage (possibly with a new investigator or decisionmaker)</li> </ul>


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### #7 Close the file




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### Close the File



- ▶ Files related to a Title IX complaint must be maintained for seven years
- ▶ Finalize the file and transmit it to the Title IX Coordinator or their designee for the case
- ▶ If you'd like to avoid being called on in six years to find your files, compile and send them to the Title IX Coordinator now
- ▶ Think broadly!




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### Record Keeping

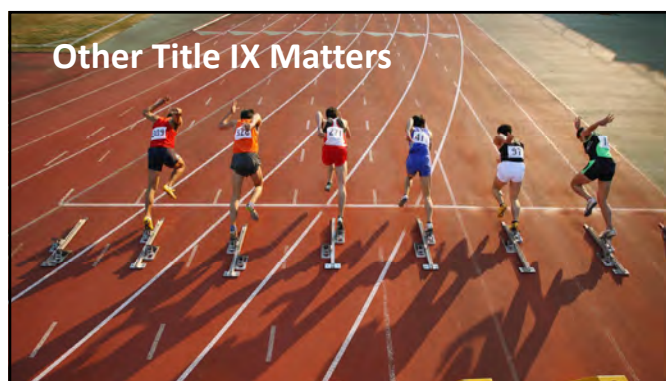
Title IX Records must be maintained for at least **7 years**

- ▶ Reports to the Title IX Coordinator regarding misconduct that reasonably may constitute sexual harassment
- ▶ Complaints
- ▶ Informal Resolution documentation
- ▶ Documentation of the grievance process (including any emergency removal, dismissal, or appeal)
- ▶ Investigation reports, written determinations, appeal determinations
- ▶ Actions to respond (including supportive measures, disciplinary sanctions, remedies)
- ▶ Decisionmaking (whether to initiate a complaint, offer informal resolution, etc.)
- ▶ Training records



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### Other Title IX Matters




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### Title IX


- ▶ Discrimination
  - ▶ Different Treatment
  - ▶ Disparate Impact
- ▶ Retaliation
- ▶ Pregnancy Accommodations
- ▶ Athletics
- ▶ Proactive Measures



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### Title IX Coordinator's Responsibilities


- ▶ The Title IX Coordinator has a duty to coordinate your institution's efforts to comply with Title IX and its regulations and retains ultimate oversight over those responsibilities and ensure your institution's consistent compliance with its responsibilities under Title IX and its regulations.
- ▶ When an official with authority has knowledge of conduct that reasonably may constitute sex discrimination or harassment in the institution's education program or activity, the institution must respond promptly and effectively, including by following the grievance procedures and other steps to end sex discrimination and harassment, prevent its recurrence, and remedy its effects



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### Title IX Coordinator's Responsibilities

- ▶ Develops a method to survey the institution's climate and analyze information obtained
- ▶ Monitors outcomes, identifies patterns, and assesses effects on the campus climate
- ▶ Monitors students' participation in athletics to identify disproportionate opportunities based on sex
- ▶ Regularly assesses the adequacy of training opportunities and proposes improvements as appropriate



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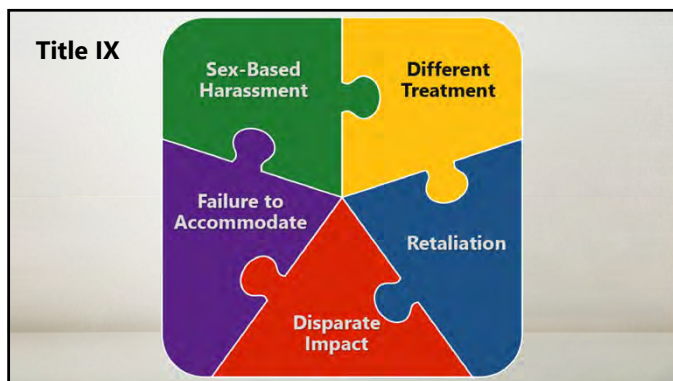
### Title IX Coordinator's Responsibilities



- ▶ Involved in everything Title IX
- ▶ Works closely with institution's leadership and legal counsel
- ▶ Knows and helps draft/revise the institution's policies and procedures
- ▶ Coordinates implementation and administration of grievance processes



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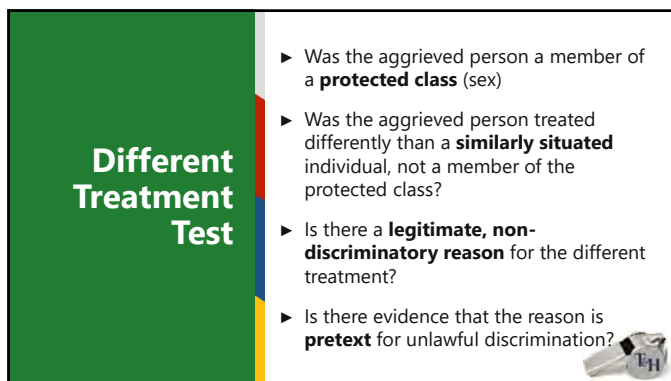
### Different Treatment

**Different treatment** discrimination occurs when an individual or group of individuals is treated differently because of their sex.

- Different treatment discrimination is generally intentional—the person or entity intended to treat the individuals differently on the basis of sex. But it does not require bad faith, ill will, or evil motive.
- Can be proven with direct, circumstantial, or statistical evidence




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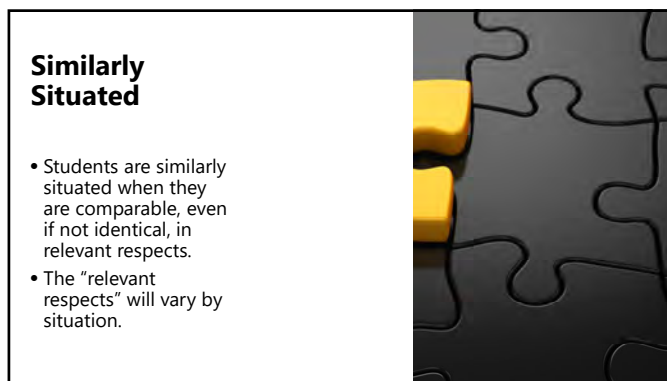


## Different Treatment Test

- ▶ Was the aggrieved person a member of a **protected class** (sex)
- ▶ Was the aggrieved person treated differently than a **similarly situated** individual, not a member of the protected class?
- ▶ Is there a **legitimate, non-discriminatory reason** for the different treatment?
- ▶ Is there evidence that the reason is **pretext** for unlawful discrimination?




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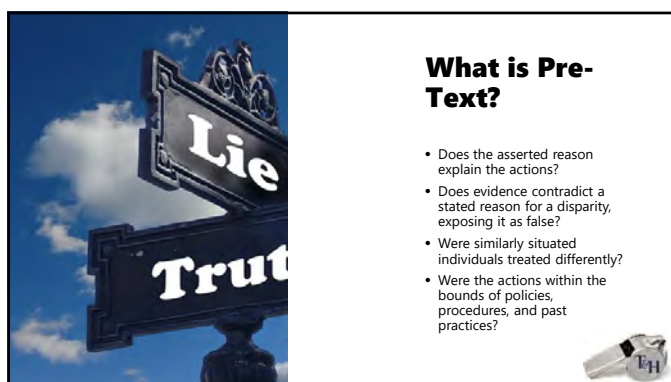


## Similarly Situated

- Students are similarly situated when they are comparable, even if not identical, in relevant respects.
- The “relevant respects” will vary by situation.




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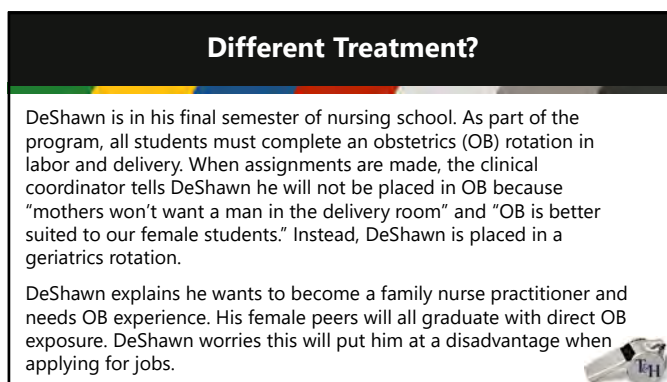


## What is Pre-Text?

- Does the asserted reason explain the actions?
- Does evidence contradict a stated reason for a disparity, exposing it as false?
- Were similarly situated individuals treated differently?
- Were the actions within the bounds of policies, procedures, and past practices?




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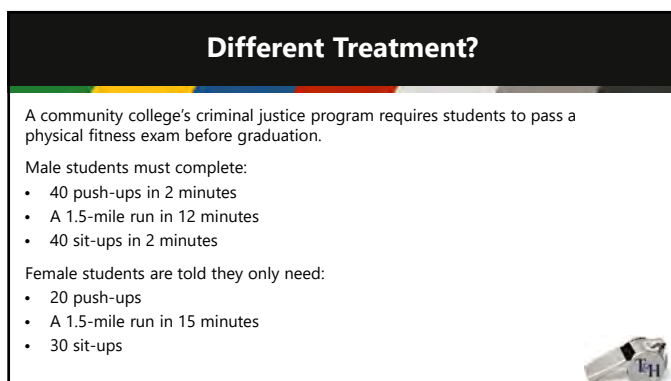
## Different Treatment?

DeShawn is in his final semester of nursing school. As part of the program, all students must complete an obstetrics (OB) rotation in labor and delivery. When assignments are made, the clinical coordinator tells DeShawn he will not be placed in OB because “mothers won’t want a man in the delivery room” and “OB is better suited to our female students.” Instead, DeShawn is placed in a geriatrics rotation.

DeShawn explains he wants to become a family nurse practitioner and needs OB experience. His female peers will all graduate with direct OB exposure. DeShawn worries this will put him at a disadvantage when applying for jobs.



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## Different Treatment?


A community college’s criminal justice program requires students to pass a physical fitness exam before graduation.

Male students must complete:

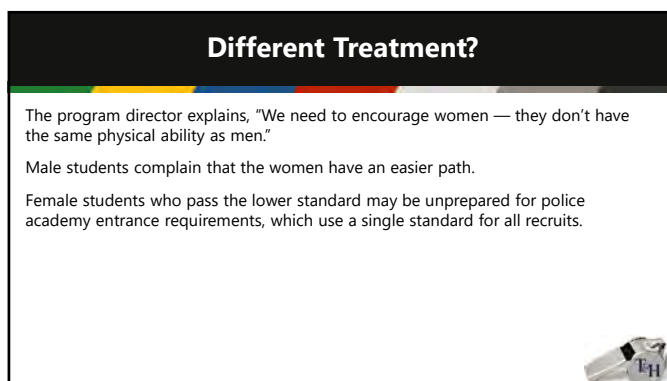
- 40 push-ups in 2 minutes
- A 1.5-mile run in 12 minutes
- 40 sit-ups in 2 minutes

Female students are told they only need:

- 20 push-ups
- A 1.5-mile run in 15 minutes
- 30 sit-ups



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## Different Treatment?

The program director explains, “We need to encourage women — they don’t have the same physical ability as men.”

Male students complain that the women have an easier path.

Female students who pass the lower standard may be unprepared for police academy entrance requirements, which use a single standard for all recruits.




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## Disparate Impact

**Disparate impact** discrimination occurs when a facially neutral policy, rule, or practice—applied evenhandedly—has a disproportionate impact or discriminatory outcome on a particular sex. It is often unintentional. The focus is on the *consequences* of the policy or practice rather than the intent of its creation or implementation.


- Consider whether the institution has a substantial and legitimate justification for using the policy, rule, or practice
- Generally, there is no respondent



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## Disparate Impact Test


- ▶ Does a neutral policy result in an adverse impact on students of a particular sex?
- ▶ Is the applicable policy necessary to meet an important educational goal?
- ▶ Is there a comparably effective alternative available that would meet the stated educational role with less of a burden or adverse impact on the disproportionately affected group?



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## Disparate Impact?

- ▶ The community college requires all students in the fire science program to pass a physical strength test before being allowed to continue into advanced coursework.
- ▶ The test includes carrying a 200-pound dummy for 100 yards without stopping.
- ▶ While the test seems neutral, the college's own data shows that 90% of male students pass, but only 20% of female students do.
- ▶ Some students point out that real fire departments allow equipment-assisted carries or require teamwork rather than this solo lift.




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## Retaliation

A harmful act against a person that is made in response to that person or another person's report, complaints, or participation in a report/complaint process


- ▶ Intimidation, threats, coercion, rumor spreading, ostracism, assaults, destruction of property, unjustified punishments, or unwarranted grade reductions aimed at interfering with an individual's rights under Title IX
- ▶ Can be committed by anyone, including the school, students, employees, and third parties



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## Retaliation Test


- ▶ Did the aggrieved person engage in protected activity?
- ▶ Did they suffer an adverse consequence?
- ▶ Is there a causal connection between the activity and the consequence?
- ▶ Is there a legitimate, non-retaliatory reason for the adverse conduct?
- ▶ Is there evidence that the reason is pretext for unlawful retaliation?



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## Accommodating Pregnant Students

- ▶ Pregnant students are entitled to voluntary reasonable accommodations or modifications following an interactive process similar to the disability accommodation process.
- ▶ Can deny accommodation if it would fundamentally alter the program (i.e., a change that is so significant it alters the essential nature of the education program or activity).
- ▶ Examples may include breaks during class, intermittent absences, access to online or homebound education, changes in schedule or course sequence, extensions of time for work or tests, allowing a student to sit or stand, counseling, and elevator access.



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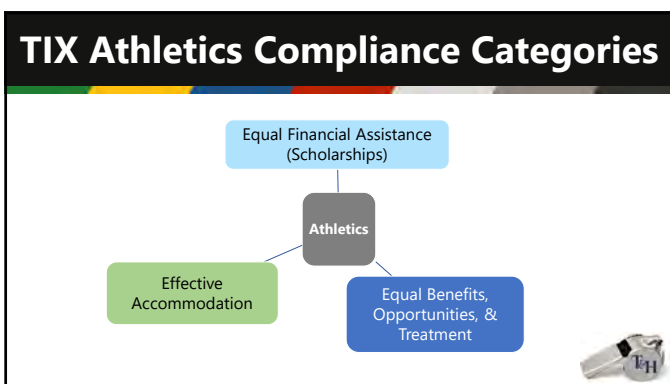
### Accommodating Pregnant Students

- ▶ Cannot require supporting documents unless the documentation is necessary and reasonable to determine the reasonable modifications to make or whether to take additional specific actions.
- ▶ May not require a student who is pregnant to provide certification from a healthcare provider that the student is physically able to participate in the recipient's class, program, or extracurricular activity unless specific conditions are met.
- ▶ Students cannot be mandated to participate in alternate programs or special services for pregnant and parenting students as a condition of enrollment, but schools and colleges may offer these programs and services as an option to students.
- ▶ Must allow pregnant and postpartum students to take leave of their academic obligations without penalty because of medically necessary absences associated with pregnancy, childbirth, or postpartum recovery.

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### Evaluation of Benefits, Opportunities, & Treatment

1. Equipment & Supplies
2. Game & Practice Scheduling
3. Travel & Daily Allowance
4. Coaching
5. Academic Tutors
6. Practice & Competition Facilities
7. Medical & Training Facilities & Services
8. Housing & Dining Services
9. Publicity
10. Recruitment

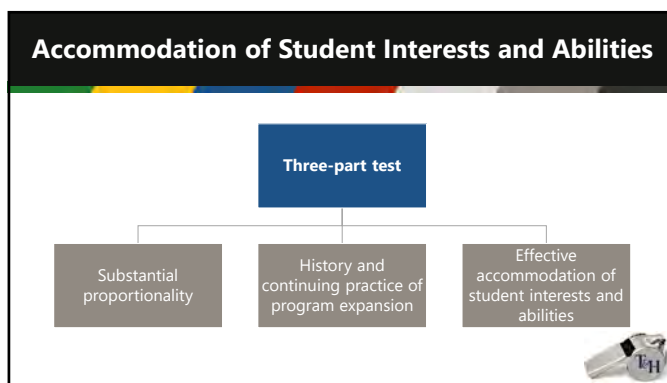
378

### A word from OCR about donors...

An institution can accept voluntary support from donors, BUT it is the institution's responsibility to prevent inequitable results.

So, if a donor donates money only to a men's team, "your school must ensure that the benefits, opportunities, and treatment are equivalent for both men and women in its athletic programs."

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## Required Training

**Title IX Team**

- Coordinator
- Deputy Coordinators
- Investigators
- Decisionmakers
- Appellate Decisionmakers
- Informal Resolution Facilitators

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## Recommended Training

- Students**
- All Employees**
- Designated Personnel**
  - Student Services/Student Affairs
  - Human Resources
  - Athletics
  - Counselors, Nurses, & MH personnel

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## Policies and Procedures

- ▶ Should be reviewed every year to implement changes learned from your grievance process and updates in law, regulations, legal cases, and OCR policies.
- ▶ Read standardized policies carefully, they often say you must do additional steps. Make sure to complete key definitions – including consent – and internal deadlines.
- ▶ Look at the interactions between Title IX policies and other policies (e.g., student and employee disciplinary policies and procedures).

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## Title IX Audits

- ▶ Audits look at issues that might be raised in an internal, OCR, or court complaint *before* a complaint is actually raised
- ▶ Significantly cheaper than an actual complaint, and can often be protected by attorney-client privilege
- ▶ OCR guidance and other documents can provide good roadmaps (e.g., recent athletics guidance fact sheets)

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## OCR complaints arise in different ways:

- ▶ Some start as internal complaints that are unresolved and are escalated by the complainant
- ▶ Some complaints are filed with OCR before institutions are even aware there is an issue
- ▶ Some complaints are filed at the same time a complainant files a lawsuit, or even after

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## Proactive Response = Prevention

- ▶ Take internal complaints seriously
- ▶ Take meaningful measures to resolve meritorious complaints
- ▶ If there are issues, address them
- ▶ Consider internal compliance reviews or audits to show proactive efforts to identify and address potential sex discrimination, including harassment
- ▶ Take voluntary steps at the outset to avoid compulsory steps at the conclusion



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## You Want Your "Title IX House" To Be In Order

- ▶ All required training complete and documented
- ▶ All required notices in order
- ▶ Website compliant
- ▶ Policies & procedures compliant
- ▶ Adherence to recordkeeping requirements
- ▶ Documented reports/complaints
- ▶ Complete documentation of grievance process




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Title IX Administrators

**T&H** Has You Covered

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**Thompson & Horton's**  
**2020 Title IX Guidebooks**  
titleix@thlaw.com

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### THOMPSON & HORTON RESOURCES

## Title IX Leadership Alliances

**K-12**

**4<sup>th</sup> Tuesday** of the month


- ▶ Register at [thlaw.com/k12alliance](http://thlaw.com/k12alliance)
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**Higher Ed**

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# Thank you!



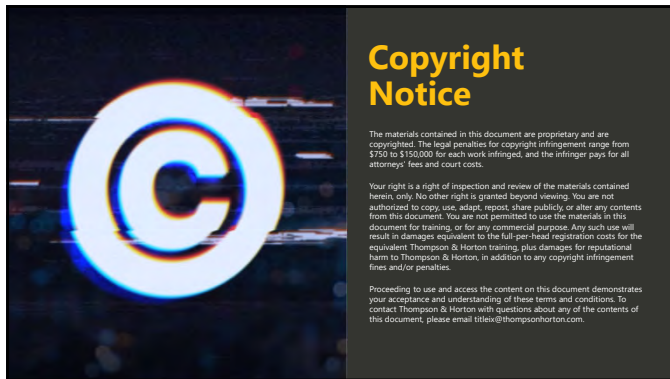
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